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CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: A COMPARATIVE SURVEY OF HARMONISED EUROPEAN LEGISLATION

A DISSERTATION SUBMITTED TO

THE DEPARTMENT OF LAW IN CANDIDACY FOR THE DEGREE OF

MASTER IN EUROPEAN INTERNATIONAL AND COMPARATIVE LAW

BY

TERESA MORAIS LEITAO

FLORENCE, ITALY

JANUARY, 1995

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CHAPTER 1

INTRODUCTION

1.1. THE TOPIC

1.1.1. Environmental Protection through Civil Liability

Although civil liability as a means of compensating environmental damage and preventing future pollution was largely neglected in the past, its possibilities have recently been rediscovered. Previously, preventative legislative measures were considered preferable in the field of environmental protection, but violation, faulty or accidental, of environmental rules was inevitable [1] . As Kramer recently stated, "it looks as if all combined rules of Community and national environmental law, adopted over twenty years, have not managed significantly or generally to reverse the trend of the slow but continued degradation of the environment within the EEC"[2]. Therefore, the protection of the environment through civil liability instruments is one of today's most discussed subject among the experts of environmental law.

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[1] See Aline de Bièvre, "*Civil Liability and Compensation for Damages caused by certain Hazardous and Noxious Substances (HNS) during their Carriage by Sea*", who confirms the interesting assumption stated by Murphy's law, according to which if something can go wrong it will go wrong;

[2] See Ludwig Krämer, "*The implementation of Environmental Laws by the European Economic Communities*", 34 German Yearbook of International Law, Berlin, 1992, pp. 9;

The growing risk of environmental damage that is inherent in modern industrial activity has stressed the need for the compensation of such damage to be regulated, namely through civil liability rules. In fact, the growth of the economy and of the levels of production have led to an increase of environmental accidents, namely oil spills, acid rain, water pollution and the greenhouse effect [3]. Notwithstanding these major accidents, today's environmental concerns relate more to barely detectable traces of substances in the air, soils and water which cause non-signature diseases. In fact, as the Green Paper correctly stressed, damage caused by non-accidental activities is less spectacular but more extensive and therefore as much in need of remedial action [4]. However, even though these types of injuries should preferably be dealt with through preventative regulation, an appropriate civil liability system may provide an important supplementary system of environmental regulation and an efficient mechanism in compensating victims of property and health injuries [5].

In theory, by identifying the cause of environmental harm, and quantifying the harm caused to the plaintiff, the individual assignment of liability through the court provides compensation to victims while internalising the social costs of harm producing activities [6]. Accordingly, any civil liability system is useful in the protection of the environment as long as it provides a fair compensation for damage caused to

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[3] See Peter Wetterstein, "*Recent Trends in the Development of International Civil Liability*" in Nordic Journal of International Law, 1991, vol. 60, nº 1-2, pp. 49, who confirms that the risks of environmental catastrophes increases all the time due to the rapid technological and industrial development in the world and to the increasing intercourse between countries and people;

[4] See also Hans Ulrich Jessurun d'Oliveira, "*The Sandoz Blaze: the damage and the public and private liabilities*", in International Responsibility for Environmental Harm, Chapter 18, who confirms that accidents are just as "structural as the regulated releases covered by permits and as the releases from diffuse sources, the total quantity of which far exceeds those from accidents";

[5] See Peter S. Menel, "*The limitations of legal institutions for addressing environmental risks*" in Journal of Economic Perspectives, 1991, vol. 5, issue 3, pp. 94;

[6] See Shavell, 1987

individuals and fulfils its preventive and economic function. In other words, such a liability system should deter the originator of the environmental damage from allowing such damage to occur at all - preventative function - and the costs of compensating the damage caused by a certain productive and economic activity should be imposed upon its originator, thereby favouring those producers who have avoided causing such damage - economic function - [7].

Concluding, it is not realistic to disregard the "pathological" regulation of the environment just because its damage is not desirable and this is stressed by Betlem, according to whom "it is becoming increasingly clear that environmental law of the command and control type is alone insufficient for an effective protection and enhancement of nature and the environment" [8].

1.2. THE AIM OF THE THESIS

1.2.1. The Main Queries

This thesis not only considers the different possible systems of civil liability for environmental damage but also, by considers the existing legal instruments or proposals in Europe and tries to analyse the main problems raised by the academic and institutional debate around each of them. Since a general comparison of all national legal systems would be a task too vast for the extent of this work the thesis will limit itself to the harmonisation effort that is being made in Europe.

Therefore, it will mainly analyse and compare the potential future systems of civil liability for environmental damage in Europe, namely the EEC Draft Directive on Civil

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[7] See Rüdiger Lummert, "*Trends in Environmental Policy and Law: Changes in concepts of civil liability*",

[8] See Gerrit Betlem, "*Civil liability for transfrontier pollution*", in International Environmental Law and Policy Series, Graham & Trotman, London, 1993, pp. 7;

Liability for Waste and its subsequent Green Paper with the Council of Europe Convention on Civil Liability for Damage caused by Dangerous Activities.

1.2.2. Main questions which will not be referred to

Although the approach of this thesis could also include a discussion whether European Environmental Law should be harmonised or not, it will be implicitly considered that the regulatory differences in this field between each Member State contribute to the increasing degradation of the European, if not global, environment, and, furthermore, hinders the establishment of a Common Market [9].

Since the interest of the thesis lies more in private law remedies as efficient instruments to compensate pollution victims, the research will not include State and/or international liability, because these deal mainly with issues of public and private international law [10]. Nevertheless, the importance of the Brussels Convention and other relevant issues of private international law will be briefly referred to.

1.3. CONFIGURATION OF THE THESIS

1.3.1. Organisation

This introduction is divided into three chapters, including this first one which broadly presents the objective of the work, followed by the 2nd Chapter, which analyses the definition of environment and environmental damage given by the

[9] Confirming the need for uniform liability systems see again Peter Wetterstein
[10] On state liability for transboundary environmental damage see Thomas Gehring and Markus Jachtenfuchs, "*Liability for Transboundary Environmental Damage*" in European Journal of International Law, vol. 4, nº 1, 1993, pp. 92-106; see also Ida Koppen, "*Environmental Liability in a European perspective*" in EUI Working Papers EPU nº 91/12 who generally elaborates on the main international liability regimes; very important the papers of the Hague Conference on Private International Law, "*Note on the law applicable to civil liability for environmental damage*", Preliminary Document nº 9 of May 1992;

above-mentioned legal instruments and proposals, and finally the 3rd Chapter, which aims to show the usefulness of civil liability instruments in the compensation of pollution victims.

The second part of the thesis is also divided into three chapters. Chapter 4 will make a brief comparison between the different possible systems of civil liability - fault, strict and/or risk liability - and summarise their main characteristics. Chapter 5 will then specify the main legal options taken by the European Community in the formulation of a harmonised system of civil liability for environmental damage in general, namely by presenting its reflections and results regarding the Draft Directive on Civil Liability and the conclusions made in the Green Paper. Likewise, Chapter 6 will try to show the affinities and differences between the Council of Europe Convention and the EC's present position on the subject by analysing and evaluating the Convention's main characteristics and legal choices.

Finally, in the conclusion I will try to elaborate on the specific aspects of each legal instrument that should be used in the conception of a harmonised system of environmental liability in Europe.

1.3.2. Outlook

As an early environmental lawyer said, "the problem of the restoration and maintenance of a liveable environment is, to a large extent, the problem of the control of administrative agencies by the courts" [11]. This statement denotes that along with the instruments of civil liability the protection of the environment also depends on the judicial control of public authorities. The administrative branch of the State is mostly controlled through its administrative courts, and therefore administrative liability

[11] See Sive, "*Some thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*", 70 Columbia Law Revue 612-615, 1970;

should also have been considered in this work but its limited extent does not allow an adequate study of such issue. I will try to demonstrate the efficiency of civil liability instruments to adequately compensate and prevent environmental damage, even that caused by public authorities.

CHAPTER 2

DEFINITIONS USED IN THE THESIS

2.1. DEFINITION OF THE ENVIRONMENT

As the Green Paper [1] stressed, the concept of environment needs to be determined in order to define damage to the environment, the latter definition being of great importance in the decision whether or not such damage can be compensated for via a civil liability action.

Initially, when environment normative references were scarce, the doctrine did not conceive the environment as a whole but rather divided it into several different notions [2]. For example, Giannini [3] understood it in three different senses: naturalistic, meaning the natural elements (landscapes, cultural assets and historical centres, natural resources) whose maintenance is legally considered; spatial, meaning the geographical spaces subject to legal protection against pollution; and, finally, in an urbanistic sense.

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[1] "Communication from the Commission to the Council and Parliament and the Economic Social Committee: Green Paper on Remedying Environmental Damage", COM(93) 47 final, Brussels 14/5/93, pp. 10;

[2] See Francesca Pestellini, infra note , referring to a legal debate between the unitary theory which considered the environment as an unique good and the atomistic theory according to which the environment was made of a plurality of goods;

[3] Giannini M.S., "*Ambiente: saggio sui diversi suoi aspetti giuridici*", in Rivista Trimestale Diritto Pubblico", 1973, pp. 15 e Ss.;

More recently, the opinions have diverged about the extent of the definition of environment and three possible concepts have been ascertained: a broad one, which would include not only the biological aspects but also the social, cultural and economical aspects that involve a human being; a restrictive one, limited to the natural elements that surround a human life, and, finally, a normative concept, which also includes the legal norms regulating the natural environment [4].

2.1.1. In Community Law

Working through the enormous quantity of environmental instruments that the Community has enacted over the past twenty years, one comes to the same conclusion as for international law, i.e. that each specific instrument gives, implicitly or explicitly, its partial definition of the environment. Although one of the main objectives of the 1957 Treaty of Rome was "the constant improvement of the living and working conditions", it did not include any explicit reference to the environment or to its protection [5].

Nevertheless, the need to regulate the environment and establish guidelines for its protection was soon felt, initially in the field of product and industrial standards. Furthermore, the harmonisation of the Member State laws in the field of environmental law was initially based on former article 100º of the 1957 Treaty, in order to ensure the free circulation of goods necessary for the "establishment and functioning of the common market". Later on, the objective of "improvement of the living conditions" was used to further base environmental legislation in article 235º,

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[4] Professor Gomes Canotilho, "*Procedimento Administrativo e defesa do ambiente*", in Revista de Legislação e Jurisprudência de nº 3799, pp.289-290 citing Messerschmidt, "*Umweltabgaben als Rechtproblem*", Berlin, 1986; M.Kloepfer, "*Umweltrecht*", München, 1989; Hoppe/Beckmann, "*Umweltrecht*", München, 1989;

[5] See Ludwig Krämer, "*Focus on European Environmental Law*", Chapter 1, Part 2, confirming that in the EEC Treaty of 1957 there was no individual right to an environment, not even a catalogue of fundamental individual rights and freedoms;

which enabled the Council to take action to achieve this objective of the Community although the Treaty had not explicitly provided for the necessary powers.

Only recently, when the Draft Directive on Civil liability for Damage caused by Waste was being discussed [6], the Parliament proposed an amendment in which it defined the environment as "the sum of the earth's biotic and abiotic natural resources, such as air, water, soil, flora and fauna or any part thereof" [7]. However, the Commission, considering that no definition of the environment had been given by Community law until then, did not adopt the Parliament's definition in its amended proposal [8].

2.1.2. In International Law

Usually environment is defined in the several international instruments with various "nuances", taking into account the different types of pollution which are to be regulated, and usually each international organisation and/or program uses its own definition. For example, the "Conseil Internationale de Langue Française" defined the environment as "the totality, in a certain moment, of all the physical, chemical, biological agents and of the social factors which may have a direct or indirect, mediate or immediate effect on human beings or human activity" [9].

Probably, the 1972 Declaration of Stockholm was the first to give a somewhat definition of environment by affirming that the world's natural resources - air, water, earth, land, flora and fauna and especially the areas considered to be natural ecosystems - should be preserved in the interest of the present and future

[6] See chapter 5 on Community Law for further developments
[7] Amendment no 8 of Parliaments 2nd Report, *infra* note
[8] See article 2/1 of the Amended Proposal and the Explanatory Statement of the Parliaments 2nd Report, infra notes and
[9] Salvatori Patti, "*Ambiente (tutela civilistica)*" in Dizionari del Diritto Privato, vol. 1, Diritto Civile, pp. 31;

generations through careful planning and management. The most recent definition comes from the recently approved Council of Europe Convention [10] which broadly defines environment as including "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape" [11]. Strangely enough this definition does not seem to include the social and economical effects of human activity.

The trend of international law has been to choose a broad concept of the environment in which the elements resulting from human activity are considered as relevant as the natural elements. Thus, the interpretation of the Council of Europe Convention definition may raise some doubts as to whether certain damages to the individual's right to a healthy environment are to be included in its scope or not.

2.2. DEFINITION OF ENVIRONMENTAL DAMAGE

In general terms, most civil lawyers define damage as any material or moral injury sustained by a person as result of the activities of a third party [12]. Nevertheless, this definition of damage may not be broad enough to cover the pollution of the environment, especially in those systems where there is no individual right to the environment. As has already been mentioned it is necessary to define environmental damage in order to determine which injury can be compensated for via civil liability law. This because environmental damage does not always implicate an economic

[10] Council of Europe Convention on Civil Liability for Damage resulting from activities dangerous to the Environment, Lugano 21/6/1993;
[11] See article 2º/10 of the Convention ;
[12] Anne Surzur, "*Liability for environmental damage in Europe*", in Europe Information Service, 1993;

loss or an individual injured party, characteristics which are essential to the effective operation of a civil liability system.

Furthermore, environmental damage may have several distinctive features from the damages that are legally relevant to the traditional systems of civil liability, namely personal injury, property damage and economic loss. In fact, the unusually large extent of the damage, the huge number of possible originators of the damage, the several injured persons and the complexity of the causal relationships are some of the unique characteristics of environmental damage that must be taken into account when formulating its definition.

Therefore, the recent instruments referring to environmental liability have accepted that pollution of the environment may be caused by an industrial activity, may result from several activities led by different operators [13] and/or it may result from activities carried out in the past.

2.2.1. In Community Law

The Green Paper stresses the need not onyl for a legal definition of environment but also of environmental damage due to the importance in determining the level at which a certain polluting activity will constitute an "impairment to the environment". Furthermore, by limiting the restoration and compensation measures due for such impairment this definition will also be limiting the costs that an injured party can sue for via a civil liability action [14].

As in relation to the definition of environment the several Community Directives and/or Regulations also define damage to the environment according to the type of pollution they seek to regulate. Nevertheless, when analysing these several

[13] Examples of these types of chronic or cumulative pollution can be seem in the COs emissions into the atmosphere; see Anne Surzur, pp. 6;
[14] See point 4.1.2. A) of the Green Paper

Community law instruments the question still remains as to when the concept of damage to the environment includes damage to persons or property and when it only considers the impairment of the environment as such.

This is also one of the doubts the Commission's proposal for a Directive on Civil Liability caused by Waste tries to clarify. Although it starts by defining injury to the environment "as any significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water, soil and air" [15], it also considers necessary the compensation of death or physical injury and of damage to private property [16]. It seems as if it distinguishes two different concepts: a stricter one of "injury" to the environment as such, and a broader one which also includes personal damages. These personal damages are also to be compensated when the private property of the injured person has been subject to destruction or to deterioration.

The use of the term "modification" was criticised by the ESC [17] which stressed that modifications can also be of a positive nature and even result in an improvement of the environmental conditions. Such positive modifications should be promoted rather than penalised, a criticism confirmed by the Parliament, who suggested instead the use of the term "deterioration"[18]. Not only was this suggestion adopted in the final version of the Proposal, but also the term "impairment to the environment" substituted the term "injury to the environment".

The new concept of impairment to the environment is no longer defined as those interferences with the environment which are "significant and persistent", but refers only to significant deterioration of the environment to avoid leaving out the temporary

[15] See article 2/1 d) of the Original Commissions Proposal, infra note
[16] See also Chapter on Community law
[17] Opinion on the proposal for a Council Directive on Civil Liability for damage caused by Waste in OJ nº C 251, 4/10/1989, pp. 3;
[18] See amendment no 8 of Parliaments 2nd Report, infra note

interferences, as it did before [19]. This amendment is of some importance, since the national legislator and judge may not ignore those environmental damages whose effects are only temporary, as it could before. Nevertheless, the concept of significant deterioration of the environment still leaves a dangerous margin of discretion: when will a certain damage to the environment be considered significant or when will it be considered negligible and thereby not worthy of consideration under this liability system ?

Returning to the Green Paper [20], it states that "a legal definition of damage to the environment is of fundamental importance, since such a definition will drive the process of determining the type and scope of the necessary remedial action and thus the costs that are recoverable via civil liability". An important conclusion to be reached is at what point pollution of the environment can be considered an environmental damage, to be compensated by civil liability.

2.2.2. In International Law

Within international law there are three different levels of rules regarding environmental damage, namely those relating to international responsibility for wrongful conduct [21], for injurious consequences arising out of acts not prohibited by international law, and also the national or harmonised rules on civil liability for specific hazardous activities [22].

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[19] See article 2/1 d) of the Amended Proposal;
[20] See above note 2;
[21] See article 21 of the Environment Protection and Sustainable Development of the Expert Group on Environmental Law of the World Commission on Environment and Development whose paragraph 1 establishes that" a State is responsible under international law for a breach of an international obligation relating to the use of a natural resource or the prevention or abatement of an environmental interference";
[22] See Preface to "*International Responsibility for Environmental Harm*", edited by Francesco Francioni and Tulio Scovazzi, International Environmental Law and Policy series;

Furthermore, the scope of liability of the several international instruments is usually limited to the damage caused by specific economic activities [23] and therefore the definition of environmental damage is closely connected with the meaning given to the term pollution, which in international law has been interpreted as the "introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of a nature to endanger the human health, living resources and ecosystems, deteriorate natural properties, and impair or interfere with amenities and other legitimate uses of the environment" [24]. Accordingly, environmental damage in its broadest meaning includes injury to personal health and property and impairment to the environment *per se*.

2.2.2.1. In the Council of Europe Convention

Similar to the Community legal instruments, the Convention defines damage as including damage to individuals, the impairment to the environment and the costs of preventive measures taken to minimise the damage and further loss or damage thereof related [25]. In order for such damage to be compensated it must result from the dangerous nature of the activity, namely from the hazardous properties of the substances, from genetically modified organisms or micro-organisms, or from waste.

As in the proposed EEC Directive damage to individuals includes not only their personal injury and death but also loss or damage to their property. Although the

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[23] For example, see the point of the Green Paper that refers to the Convention on Third Party Liability in the Field of Nuclear Energy (Paris 1960) and to the International Convention on Civil Liability for Oil Pollution Damage (Brussels 1960) which defines damage to the environment means the loss or damage caused outside the ship carrying oil or the contamination resulting from the escape or discharge of oil from the ship, wherever such escape and discharge may occur, and includes the cost of preventive measures and further loss or damage caused by preventive measures.

[24] See article 1º of the Corpus of Principles and Rules Relative to the Protection of the Environment in "*La Pollution Transfrontiére et le Droit International*" by the Académie de Droit International de la Haye;

[25] See article 2º/7 of the Convention and point 33 of the Explanatory Report;

Convention includes in the damage to personal property, its destruction and/or deterioration, it excludes from compensation the damage to the installation itself or to property under the control of the operator of the site [26], thereby being more restrictive than the EEC proposed Directive.

Unlike the Draft Directive, the Convention does not define impairment of the environment, but it limits the compensation for such impairment to the costs of measures of reinstatement taken or to be taken [27]. These measures may be in the form of reintroduction of equivalent components into the environment when the reinstatement or the restoration of those damaged or destroyed components of the environment is impossible [28].

Furthermore, the Convention also includes in its definition of damage the costs of preventive measures and any loss or damage caused by these measures [29]. By further defining preventive measures as "any reasonable measures taken by any person" to prevent a threat of damage or to avoid its worsening the Convention acknowledges the advantages of these preventative action clauses [30]. Although these preventive measures are only compensated if they are reasonable, a notion which is left to the courts' interpretation, such clauses encourage action to be taken after the release of the harmful substance but before the occurrence of the damage.

[26] See article 2º/7 b) of the Convention and point 35 of the Explanatory Report
[27] See article 2º/7 c) of the Convention;
[28] See article 2º/8 of the Convention and point 40 of the Explanatory Report;
[29] See article 2º/7 d) of the Convention;
[30] See article 9º of the Convention and point 41 of the Explanatory Report;

CHAPTER 3

ROLE OF CIVIL LIABILITY IN THE PREVENTION OF ENVIRONMENTAL DAMAGE

3.1. INTRODUCTION

According to several authors, especially community law authors, privately initiated litigation plays only a minor role in the protection of the environment, mainly due to the procedural difficulties that it usually encounters. In fact, the procedural difficulties private persons face in different countries with regard to access to environmental justice vary from the refusal to give standing to private organisations, which are usually better prepared to support the financial burden of going to court, to the legal configuration of its civil liability regime, which in many countries has still not developed from the traditional fault liability regime [1]. However, if polluters are only controlled by public authorities, the precautionary principle and the polluter pays principle may be somewhat distorted.

According to a certain doctrine the main objective of any civil liability system is to equally distribute wealth since the externalisation of reparation costs would mean a

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[1] See Dehousse, *supra* note , refering the role of the ECJ in restructuring the national procedural systems, for example in the Case *Frankovich* where it was recognised that the different in the remedies available at national level, affects the extent to which individuals can rely on the rights derived from Community law;

deprivation of rights of the pollution victim in favour of the benefit of the risk creator [2]. Therefore, when deciding for a specific liability regime, the legislator - either the community, international or national legislator - should be aware of the contrasting goals to be achieved through such regulation. If, when regulating environmental liability, preference is given to awarding compensation to victims, then such a system may not be a very effective pollution deterrent. On the other hand, a system that imposes sufficient liability costs to deter a potential polluter from causing environmental damage may lead to situations of overcompensation [3].

Furthermore, it is very important to discuss whether civil liability instruments are adequate to compensate the impairment of certain elements of the environment which can not be appropriated, such as the sea or the atmosphere [4]. In other words, if certain environmental aspects are considered goods of the public domain, can its impairment be considered damage so as to be compensated for via civil liability law ?

3.2. POSITION OF THE EUROPEAN COMMUNITY

[2] See Günther Doeker and Thomas Gehring, "*Private or International liability for transnational environmental damage - The precedent of conventional liability regimes*" in Journal of Environmental Law, vol. 2, nº 1, 1990, pp. 2;
[3] See in relation to the goals of the EEC Draft Directive, Linda M.Sheehan, "*The EEC's proposed Directive on Civil Liability for damage caused by waste: taking over when prevention fails*", in Ecology Law Quarterly, vol. 18, 1991, nº 2, pp. 439, note 251;
[4] For example, in relation to Italian Law see Francesca Pestellini in "*Environmental Liability in a European Perspective*", EUI Working Papers EPU nº 91/12 refering to the initial case law of the Court Accounts who considered the environment as an nique good destined for collective enjoyment nd consequently only the State, as representative of such collectivity, had the right to compensation;

According to Thieffry, civil law instruments should only intervene when the Community market mechanisms [5] and the incentives to subscribe to voluntary engagements are inefficient. Consequently, he considers that the implementation of the "polluter pays" principle through civil liability should be the most radical instrument of Community environmental policy [6]. This kind of position shows that the European Community has been mainly concerned about the need for an effective implementation and enforcement of environmental Directives and Regulations [7]. In fact, the Community attention focuses on the enforcement role of Member States and of their local authorities as guarantees that the environment is effectively protected [8].

Furthermore, not only prevention is considered a fundamental principle in the protection of the environment [9] but the participation principle and the polluter pays principle are also being increasingly adopted. Such a "polluter pays" principle was initially referred to by the Community in its 3rd Environmental Programme in the following manner: "the principle's provisions for charging polluters for environmental protection-related costs impels polluters to reduce the level of pollution caused by

[5] See Lord Clinton Davis in "*Environmental Liability*", Introduction to Chapter V - The Regional Perspective on the use of economic and political weapons and the role of international law, who includes among the possible market mechanisms to promote the environmental protection the implementation of environmental charges and taxes, strict allocation of responsibility and liability and the giving of reliable information on environmental risk to ordinary citizens;
[6] Patrick Thieffry, "*Les nouveaux instruments juridiques de la politique communitaire de l'environmment*", in Revue Trimestrielle de Droit Europeen, Paris, Ann. 28, nº 4, Oct.-Dez. 1992, pp. 669-685;
[7] See for a more detailed description of the enforcement problems Richard Macrory, "*The enforcement of Community Environmental Laws: Some Critical issues*", in CML Rev., 1992, pp. 347; see also Eckard Rehbinder and Richard Stewart, "*Environmental Protection Policy*", vol. 2, Chapter VIII, Part A/ 3;
[8] See Ludwig Krämer, "*Focus on European Environmental Law*", Chapter 9, who believes that since no group has a vested interest in seeing environmental standards actually applied, enforcement by public authorities seems all the more necessary;
[9] See article 130R of the EEC Treaty, as amended by SEA;

their activities and to seek products or technologies that pollute less" [10]. Later on, Community legislators realised that these objectives and aims could not be achieved by only using regulatory measures [11] and they considered that the "polluter pays principle" and even the Community environmental law should no longer be of an exclusively regulatory nature [12].

For example, let us look at a case where a company discharges polluting substances into a river, without a license or over the limits of the license, with the consequence that several private parties are injured or incur expenses to avoid such injury. The reaction to these polluting activities will differ according to the different environmental policies of each Member State: those countries with a central focus on environmental regulation and its enforcement will probably limit themselves to issuing an administrative order to stop such activity and applying of fines according to national, community and/or international law [13]. This will not suppress the "economic immunity" of the polluting company since not only will it leave private individuals without adequate compensation but it will enable the company to balance the possible

[10] 3rd Action programme of the EC Council of Ministers;
[11] See EC Directive 82/501, OJ C7 of 12/10/87, the "Seveso Directive"on the risks ofmajor accidents in certain industrial activities which implicitly recognises the importance both of prevention and of compensation; see also Council Declaration after the Sandoz fire, Bull. EC 11-1986, point 2/1/146;
[12] See Gilles J. Martin, "*Compensation for Ecological Damage*" in Compensation for Pollution Damage, Chapter 2, who recognises that in the long term the desirable goal is to prevent damage from occuring, but that in the short and medium term an effective system of redress is very important;
[13] Nevertheless, see Giandomenico Majone, "*Deregulation and re-regulation: policy making in the EC since the Single Act*", EUI Working Papers in SPS nº 93/2 according to which the transfer of regulatory powers to the EC Commission may improve the behaviour of polluting firms; these firms are likely to believe that the national legislators will be unwilling to to prosecute them as rigorously if they determine the level of enforcement unilaterally rather than under supranational supervision;

cost of administrative fines against the expenses it would incur if it legally eliminated its wastes [14].

3.2.1. Legal Harmonisation

Therefore, the European Community recently recognised the usefulness of civil liability as a indirect means of completing the internal market and a necessary instrument to enforce environmental regulations [15]. In fact, when stating the main objectives of the Draft Directive on Civil Liability caused by Waste, the Commission justified the harmonisation of civil liability rules in this field in order to avoid distortions in the competition and differences in the environment protection conditions among Member States [16].

In other words, these differences between Member States law could lead producers of waste to invest in those countries where the legal framework is less stringent for them and consequently more disadvantageous for the environment and for potential pollution victims [17]. The consequent transfer of the polluting activities to

[14] See Ralph P. Kröner, "*Environmental Liability Insurance: Tour d' horizon in Europe*" in Transnational environmental liability and insurance, Part A, Chapter 1 who confirms that from a financial point of view it is often cheaper for companies to discharge noxious substances illegally instead of neutralising them or disposing of them in a lawful way;

[15] See again Eckard Rehbinder and Richard Stewart, supra note , who in the end agree that litigation mong private parties may have a supplementary function in controlling the implementation and enforcement of dirctive's obligations;

[16] See the 3rd recital of the Amended Proposal's Preamble, *infra* note ; among the many cases that consider necessary the harmonization of environmental protection measures, see Case C-306/89 *Council v. Commission* of 11/6/91 confirming that different measures result in different increases in the production costs for the manufacturers, thereby distorting the competition between Member States;

[17] See point 2 of the Draft Directive Explanatory Memorandum; see also Clifford Chance, "*European environmental law guide*" confirming the more stringent the national control levels imposed, the more xpensive it will be to comply with those

such "pollution paradises" [18] would affect the free movement of goods within the internal market and entail differences in the level of protection of health, property and the environment.

Likewise, in its 5th Environmental Programme [19] the Council of Ministers stressed the necessity of efficient implementation and enforcement of environmental measures if Community objectives in this area are to be achieved. It was further acknowledged that in the past the choice of legal instruments had been very narrow, with too much reliance being placed on regulations of the "command and control type" [20]. In order to fully respect the "polluter pays principle", the importance of regulating environmental liability was stressed and the Community was urged to establish a "mechanism whereby damage to the environment is restored by the person or body, who is responsible for the damage incurred, or by other means of liability-sharing when such person cannot be identified".

On the other hand, it was considered that the public could provide "an important spur to good performance by companies" and therefore practicable access to courts by individuals and public interest groups should be guaranteed to ensure effective enforcement of environmental measures and to put a stop to illegal practices [21].

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limist, what will lead to polluting companies to move from "clean" countries to "dirty" countries;

[18] See "*La pollution tranfrontiére et le Droit International*", by the Académie de Droit International de la Haye, pp. 63;

[19] Commission of the European Communities, 5th Environmental Programme, "Towards Sustainability", Com(92) 23 final, vol. II, Brussels 27/3/9;

[20] With regard to the American evolution see David Jacoby and Abbie Eremich, "*Environmental liability in US*", in Environmental Liability, Chapter V, Part C, remembering that the initial orientation of the American legislation was also command and control, to set specific requirements and to direct their implementation;

[21] See 5th Environmental Programme, *supra* note , Chapter 9 on *Implementation and Enforcement* stating that the public have a direct interest in the quality of their living

Later on, the Green Paper [22] confirmed the usefulness of civil liability as a "means for allocating responsibility for the costs of environmental restoration. However it also limited civil liability to a mere secondary function of "enforcing standards of behaviour and preventing people from causing damage in the future". This idea was interpreted differently by Brüggemeier [23], for whom the "additive function" of liability law refers to its limitations in preventing environmental damage. According to this author such damage is prevented by an essential complementary of three different types of state risk regulation: preventive regulation of polluting activities, reactive administrative control of risky activities - direct regulation by public law - and liability law - indirect control through private law.

3.3. THE IMPORTANCE GIVEN TO ENVIRONMENTAL LIABILITY BY THE INTERNATIONAL COMMUNITY

The International Community, as mentioned above, soon recognised the need to legislate on liability for environmental damage and the first formal expression of this

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environment, that individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected, and that prescribed environmental measures are effectively enforced and illegal practices stopped; see also W. J. Ouwerkerk, "*Environmental Liability from the perspective of an operator: Council of Europe Draft Convention on Civil Liability*", in Transnational Liability and Insurance, Part C, Chapter 3, who also believes that civil liability is an instrument entailing greater participation by the public in the guardianship of the environment;

[22] Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM(93), 47 final, Brussels 14/5/93;

[23] Gert Brüggemeir, "*Enterprise liability for Environmental Damage in German Law and EC Law*", in Ecological Responsibility: Self-Organisation in Environmental Law by Guntner Teubner (ed), Bremen, Firenze, preliminary draft, 1992;

concern was in Principle 22 of the 1972 Stockholm Declaration [24], calling for further development of international law regarding liability and compensation for the victims of transfrontier pollution and other environmental damage. The UNEP consequently established various working groups whose studies resulted in the approval of several conventions and other international instruments.

Nevertheless, most of these international instruments merely promote guidelines for the preparation of bilateral or multilateral conventions [25]. Even the resulting treaties or conventions are only general commitments which encourage co-operation and specify due diligence obligations to prevent, control and reduce pollution but rarely actually strictly prohibit of polluting activities [26].

Several relevant international conventions were later adopted, regulating civil liability in respect to some specific risk creating activities. The most important of these conventions are the Civil Liability Convention [27] - CLC - and the Convention on Third Party Liability in the Field of Nuclear Energy [28]. Since the liability regimes

[24] UN Doc.A/CONF. 48/14, ILM, 1972, pp. 1416;
[25] For a brief review on the UNEPs activities see Ahmed Fathall, "*Work on Liability within UNEP*", in Environmental Liability, International Bar Association Series, London, 1991; with a less optimistic view see Alan E. Boyle, "*International Law and Transboundary Acess to Environmental Justice*" in the Conference on "Acess to Environemntal Justice in Europe" held on the 18/4/94 at the European University Institute in Florence, who considers that although public international law has regulated environmental damage through treaties, customary law and soft-law, it cannot realistically be viewed as offereing effcient remedies for transboundry environmental damage;
[26] Riccardo Pisillo-Mazzeschi, "*Forms of International Responsibility for environmental harm*", in International Responsibility for Environmental Harm, edited by Francesco Francioni and Tullio Scovazzi;
[27] International Convention on Civil Liability for Oil Pollution Damage, Brussels 29/11/69, 9 I.L.M. 45, 1970; as amended by the London Protocol of 19/11/76, Trb. 1980, 1. Supplemented by the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels 18/12/71, Trb. 1973, 101 as amended by the London Protocol of 19/11/1976, Trb. 1980, 2.
[28] Convention on Third Party Liability in the Field of Nuclear Energy, Paris 29/7/1960, Trb. 1964, 175; Convention Supplementary to the Paris Convention and Annex,

provided by these conventions allow much of the loss lie where it falls or allocate it equitably across the industry or among participating States as a whole, they do not fully implement the "polluter pays" principle [29]. Nevertheless they can be considered an important initial effort towards partial harmonisation of civil liability rules concerning transboundary environmental damage, an effort which has culminated in the adoption of the Council of Europe Convention.

In conclusion, it is clear that the international community has increasingly regulated liability issues, improving the chances for pollution victims to bring successful claims [30]. Such trend culminated by the adoption at the United Nations Conference on Environment and Development in Rio de Janeiro of two international documents which confirm the importance of the private individual in the protection of the environment, namely Agenda 21 [31] and the Rio Declaration [32].

Brussels 31/1/1963, Trb. 1963, 176; as amended by the Additional Protocol, Paris 29/1/64, Trb. 1964, 178;

[29] Alan E. Boyle, "*Making the polluter pay ? Alternatives to State responsibility in the allocation of transboundary environmental costs*", in "International Responsibility for Environmental Harm" edited by Francesco Francioni and Tullio Scovazzi;

[30] See Thomas Gehring and Markus Jachtenfuchs, "*Liability for Transboundary Environmental Damage: Towards a General Liability Regime*" in European Journal of International Law, vol. 4, nº 1, 1993, pp.92 ;

[31] See Point 27.13 of Agenda 23 that reads "Governments will need to promulgate or strengthen, subject to country specific conditions, any legislative measures necessary to enable the establishment by non-governmental organisations of consultative groups, and to ensure the right of non-governmental organisations to protect the public interest through legal action;

[32] See Rio Declaration on Environment and Development, Rio de Janeiro, 14/6/92, 31 International Legal Materials 874 (1992); Principle 10 provides that all environmental issues are best handled with the participation of all concerned citizens, at the relevant level;

3.4. ARE CIVIL LIABILITY RULES AN APPROPRIATE INSTRUMENT WITH WHICH TO INDEMNIFY DAMAGE CAUSED TO PUBLIC GOODS

With reference to the various definitions of environment, a doubt arises as to whether civil law instruments can efficiently protect "the environment", if this protection is considered to be of public interest not belonging, directly or exclusively, to a private individual [33]. This doubt is related to the lenghty debate discussion on the nature of the environment, as to whether the right to an healthy and clean environment was defined by private law or public law theories.

Under the private law theories the protection of the environment has been dealt with as a type of neighbour relationship problem, considered a common and diffuse interest and, more recently, included among the fundamental rights of a human being. Under the public law theories, on the other hand, the environment has been considered a public good belonging to the collectivity and recently as a collective interest, defendable by civil means [34].

For example, where the damage is suffered by public goods or goods belonging to the public domain, i.e. roads, waterways, air, etc. Unlike the owner of a private good, the owner of a public good has no exclusive rights, since all persons have a right to use the public domain goods [35]. Thereby many civil authors argue that it is up

[33] Salvatore Patti, "*Diritto Civile - Ambiente, Tutela Civilistica*", in Dizionari del Diritto Privato
[34] For a complete description of the evolution see Gomes Canotilho, "*Procedimento Administrativo e Defesa do Ambiente*" in Revista de Legislação e Jurisprudência nº 3794, pp. 134 to nº 3802, pp. 7;
[35] Betlem, 1993, pp. 385;

to the States to intervene in the field of environmental protection with public instruments and that civil law instruments can only have a marginal role [36].

Furthermore, some doctrine claims that most civil liability rules only envisage the compensation of the damage and do not attempt to put an end to the polluting activity. The exclusive use of civil liability schemes could lead the polluting industry to include the indemnification costs in the final price of its products or services, thus rendering the desired deterrence effect inefficient. Only if such social costs are taken into account in the equation of the indemnification will civil liability have a positive role in the protection of the environment.

These theories were fought against by the trend to include the environment among personality rights or even among fundamental rights, in which case their protection by actions brought by each individual becomes absolutely necessary. This individualisation of the environment derived from the general idea that every person should be permitted to use civil instruments, in order to protect a good that concerns him/her in every moment of his/her existence and which contributes to the development of his/her personality [37].

3.5. ECONOMIC JUSTIFICATIONS

3.5.1. Economic Immunity

"Economic immunity " in the given example means that it can be more advantageous for the company to pay the administrative fines for not possessing the

[36] See Volkmar J. Hartje, "*Oil Pollution by tanker accidents: liability versus regulation*", who considers that damages to ecosystems that do not belong to individuals since they are public goods do not warrant compensation;
[37] Patti, pp. ,

required licences or for exceeding its limits, than to invest in improved cleaning technology and/or to deliver the substances to authorised dealers. In Brüggemeier's analysis the two forms of direct control through public law are dependent on several economic inefficiencies, for example, the influence that certain powerful industries can have on law-making and administrative decisions thereby improving their particular conditions through less stringent rules or lower fines [38].

Without denying the importance of the precautionary principle, Kiss stated that it can be "met either by previous regulation or by the existence of a general feeling that environmental damage must be compensated at such a high level that it is cheaper to avoid it" [39]. Therefore, private judicial initiative is needed to increase the financial pressure on polluting companies, since these should pay not merely through fines but also through compensation costs. In other words, if these companies are not only fined by the competent public authorities, but also made liable for damages inflicted on private legal persons, this will lead to higher investments in better precautionary schemes for the sake of economic efficiency [40].

In fact, as Polinsky and Shavell concluded in their work [41], if companies producing environmental discharges are "made responsible for cleanup and strictly liable for any remaining harm, they will take socially optimal precautions to prevent

[38] Idem, pp. 5;
[39] Alessandre Kiss, "P*resent limits to the enforcement of State responsibility for environmental damage*" in International Responsibility for Environmental Harm, Francesco Francioni and Tulio Scovazzi (eds.), 1991;
[40] See Peter Wetterstein, "*Recent Trends in the Development of International Civil Liability*", in Nordic Journal of International Law, 1991, vol. 60, nº 1-2, pp.52, who accept that rules of compensation may persuade companies to opt for less risky and environmentally faourable methods of production as long as it is economically advantageous to avoid causing damage or injury;
[41] See Mitchell Polinsky and Steven Shavell, "*Optimal cleanup and liability after environmental harmful discharges*", National Bureau of Economic Research, Working Paper No. 4176, September 1992;

discharges and undertake socially optimal amount of cleanup if a discharge occurs". According to the same authors, strict liability would serve the precautionary principle better because under the negligence rule customers would purchase more goods whose production causes discharges since their prices would not reflect liability costs.

The different civil liability systems will be analysed further on, but to clarify the above conclusion, some comments have to be made now. While it is true that different liability rules affect the final cost of goods differently, other elements must be considered necessary before prematurely concluding that under the precautionary principle the rule of strict liability is preferable. An example might be where the injured person's conduct may have contributed to the environmental damage [42]. In such cases, for reasons of efficiency, precaution demands are made on both the injurer and the victim. These "bilateral precaution" demands are only satisfied by ideal negligence rules, since with strict liability rules the polluter must always compensate the injured person, even if acting without fault, and therefore such a person has no incentive to take the necessary measures that could help to prevent damage to the environment.

On the other hand, if preference is given to the reduction of the polluting activity, the prices of the "polluting goods" will be higher under the strict liability rule than under the negligence rule, and therefore the activity of polluting industries will be greater under the negligence rules. In other words, under a strict liability system potential polluters are forced to remedy the damage caused by their activities by investing in more environmentally friendly technologies and risk-management systems; this can be very expensive.

[42] See Robert D. Cooter, "*Economic Theories of Legal Liability*";

3.5.2. "Environmental Shopping"

This concept of environmental shopping can be analysed in various ways and be given different meanings. From an economic point of view, discussed in the Green Paper, the polluting industries which are able to avoid the liability costs for the damage they cause, because restoration is not required or because the compensation costs are passed on to the taxpayers, have a competitive advantage. Therefore, multinational companies will prefer to move their polluting units to nations with less stringent regulatory requirements and/or less effective liability rules [43].

A similar idea can be found in the theories of international regulatory competition, according to which a system with a low level of environmental protection can provide an illegal subsidy to national polluting industries [44]. These systems, instead of promoting the internalisation of environmental protection costs, lead to a situation in which these costs are borne either by the society in general or by specific affected groups.

If the regulation of environmental liability is also determined by this trend towards weak environmental protection such situations will contribute to the above-mentioned "environmental shopping". In other words, this type of regulatory competition may cause polluting industries to base themselves in the countries with such systems, thus contributing to the increase of regional focus of environmental degradation. There are, therefore doubts as to which substantive questions should be regulated by supranational bodies rather than by states.

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[43] See for further developments on the relation between liability rules and competitiveness, Richard B. Stewart, "*Environmental Regulation and International Competitiveness*" in

[44] "International Regulatory Competition", Harvard Law Review nº , 1993;

Another completely different meaning that can be given to the concept of environmental shopping is that one linking it with the concept of "forum shopping". Under this rule of private international law, the injured person can freely choose the jurisdiction in which to bring his legal action: either the court of the country in which the polluting activity is based or the court where the pollution caused damage to the victim [45]. The reasons for the preference to sue in one jurisdiction rather than in another can range from the difference in limitation periods [46] to a preferable procedural law.

This principle of *forum shopping* has been accepted in several cases of transfrontier pollution, following the jurisprudence established by the case *Handelskwekerij G.J.Bier v. Mines de Potasse de Alsace SA* [47]. It has also been adopted by the Brussels Convention [48] and is therefore applied to the Member States which have ratified it.

[45] Alexandre Kiss, *"Present limits to the enforcement of a state responsibility for environmental damage"* in International responsibility for Environmental Harm, Francesco Francioni and Tullio Scovazzi (ed);
[46] See Council of Europe Convention that, in article 17, proposes uniform limitation periods in order to avoid forum shopping;
[47] ECJ Case 21/76 of 30/11/76, RJE, 1977, 323;
[48] Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, consolidated version OJ 1990 C 189/1;

CHAPTER 4

COMPARISON OF CIVIL LIABILITY SYSTEMS

4.1. INTRODUCTION

Traditionally, civil liability law was only divided among two major systems: fault-based liability and no-fault liability. Nevertheless, among the Continental legal systems the view prevailed that fault was the constitutive element of liability, although more recently fault liability is being withdrawn from a large number of areas where it applied.

Since environmental liability was based in the general theory of torts and/or liability for damages, this branch of liability law initially adopted the same division between fault and strict liability [1]. However, in some cases it was necessary to adapt tort rules to embrace the special situations of damage to the environment, extension which has led to a certain interdisciplinary development. This development is interdisciplinary in the sense that not only did such adaptation of civil liability to the specific problems of environmental damage contribute to a better use of liability rules as an instrument of environmental protection but also the contrary was true. The solutions found when using civil liability rules to compensate for such complex

[1] Ida J.Koppen, "*Environmental Liability in a European Perspective*", EUI Working Papers EPU nº 91/12;

damage, as environmental damage helped to surpass the present limitations of civil liability law in dealing with other types of complex hazards [2].

With this increasing complexity of polluting hazards and their multiple causes, new forms of liability were deemed necessary, namely risk liability, collective responsibility, enterprise, market-share and risk-share liability that are, among others, some of the possible alternatives developed by the doctrine and jurisprudence. Following, a brief description of each liability system is made in order to broadly ascertain its advantages and limitations in efficiently protecting the environment. Civil liability is not described in its general terms or concepts, but only in those aspects specifically relevant to regards environmental damage.

4.2. FAULT-BASED LIABILITY

Under fault-based liability, in order to obtain the wanted compensation, the injured party has to prove that the polluter committed an intentional or negligent wrongful act which caused the damage suffered [3]. The distinguishing requirement of this system is the need for the plaintiff to prove that the defendant's conduct was faulty. In other words, the injured person will have to provide evidence that the polluter has intentionally or recklessly breached a duty to comply with a legal standard of care or a rule of law [4] .

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[2] See Rüdiger Lummert,"*Trends in environmental policy and law: changes in concepts of civil liability*", who says that to deal with the liability for environmental damage, the law of torts has been partially modified by particular rules concerning the neighbourhhod relationships, by provisions regulating the operation of industrial installations and by specific situations of State liability.

[3] See the Green Paper, which gives a brief but very complete summary of the characteristics and problems of the two systems: fault and strict liability;

[4] In relation to product safety law see Gert Büggemeier and Hans W. Micklitz, *"European Product Safety, Internal Market Policy and the New Approach to Technical Harmonization and Standards: Product safety legislation in France and the UK"* in EUI Working Papers in Law 91/11, February 1991, according to which the common tort

Some Community lawyers, in confirmation of their regulatory approach to environmental protection consider that the proof of breach of environmental regulations may be sufficient to prove that the polluter's action was faulty. For them, the existence of norms protecting the injured interest lightens the plaintiff's burden to proof the causal connection; since it will be sufficient to prove that those norms were breached in order to establish the fault required. Although under this perspective the environmental regulations are better enforced, since any breach of them provides evidence of fault, there is always the risk of new types of pollution not yet covered by specific laws.

Nevertheless, with the liberal interpretations courts have been using, the fault liability system has come closer to strict liability than one expects. For example, in the Netherlands the requirement that the plaintiff has to prove the faulty or negligent conduct of the defendant has gradually been transformed and in several cases, the courts have acknowledged instead that a duty of care to take all possible precautions and to be aware of all potential damages should be imposed on the defendant [5].

Further requirements of such a system are usually unlawfulness, imputation, causality and damage [6]. Although the grounds of these requirements vary according to the different legal orders, fault or strict liability, their characteristics will here be only briefly and generally analysed because they are usually common to both systems.

4.2.1. Fault

law allowed three different grounds of claim: breach of a statutory duty, negligence and contract. In the offence of breach of statutory duty, the plaintiff has to prove that the defendant has breached the relevant safety regulation, by bringing an unsafe product onto the market;

[5] Christopher Van der Hauwaert, "*Clean Take-overs in the European Single Market*", in European Business Law Review, November 1991, pp. 269;

[6] For Dutch Law see Betlem, pp. 292; For Portuguese Law see Almeida Costa;

First, the injured person will have to prove that the polluter's act or omission which caused the environmental damage was either intentionally or negligently wrongful. Intention occurs when the defendant consciously and willingly pursues a specific wrongful result (*dolus directus*) or, while recognising and not wanting this result as a probable consequence of his conduct , accepts its possible materialisation (*dolus eventualis*).

On the other hand, negligence is related to every persons' duty to behave according to a certain objective standard of care, which is, in many legal orders, referred to as the *bonus pater familias.* Under negligent liability, the defendants' behaviour shall be verified against the hypothetical behaviour of a reasonable man, an average family man, considering the latter in the same external situation as the defendant. This requirement can be explained under a different perspective, namely the imputation of the unlawful act to the defendant.

4.2.1.1. Imputation

There are two different meanings that can be given to the concept of imputation: one means that the plaintiff has the burden of proving, usually by a preponderance of evidence, that the defendant caused the damage suffered [7]; and second the unlawful act has to be imputed to the defendant as a result either of his faulty or of his negligent conduct. . In other words, it is the plaintiff who has to prove that the defendant consciously and willingly pursued the damage caused [8] or, while recognising this damage as a possible result of his conduct, and not wanting it,

[7] See Jan Ekering, "*Several theories on liability in the Dutch DES case*" in Transnational liability litigation and insurance by Ralph Kröner, 1993;
[8] *Dolus directus*

accepted it as a probable occurrence [9]. Imputation thus presupposes an evaluation of the individual and concrete circumstances of the polluter's behaviour.

Some systems divide this requirement into two different phases: first, to examine whether the defendant at the moment the injury occurred was capable of predicting it [10]; and, second, to decide on the existence of negligence or fault in the defendant's conduct.

4.2.2. Unlawfulness

Although certain legal systems tend to confuse this requirement with the concept of fault, generally a certain act or omission is considered unlawful when it has violated a specific legal norm without any legally recognised excuse. These legally recognised defences may include self-help, state of necessity, ot that the injured person expressed consent, among others.

Traditionally, unlawfulness depended on the harmful nature of its result but the actual doctrine on the subject considers that it should instead be determined by the harmful nature of the conduct itself [11]. Concluding, the plaintiff will first have to prove that the defendant's acts are unlawful either due to the breach of a statutory duty, the infringement of a right or the breach of the duty to take due care not to inflict injury on others [12]. This last concept of a duty of due care [13] has been developed by the courts

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[9] *Dolus eventualis*

[10] Article 488 º of the Portuguese Civil Code;

[11] Traditionally for German law, unlike French law, the concept of fault as an attitude of a person who intentionally or negligently causes damage to another is distinct from the notion of unlawfulness as the violation of a legal norm whose harmful result is only disregarded if a legally recognised defence exists. Nevertheless a new academic approach, supporting a wrongful conduct theory, includes the violation of the general duty of care in the concept of unlawfulness and reduces fault to a question of imputability. See B.S.Markesinis, "*The German Law of Torts, A comparative introduction*", 2nd ed., Oxford 1990, pp. 59;

[12] For a comparison of the different concepts of duty of care, fault and unlawfulness see F.H.Lawsin and B.S.Markesinis, "*Tortious liability for unintentional harm in the common law and the civil law*", Cambridge 1982, vol. 1, pp. 99;

in order to cover those persons who have failed to comply with a specific due-diligence standard [14].

4.2.3. Causation

Third, a causal connection between the polluter's conduct and the injury suffered by the plaintiff has to be established, a link that may be very difficult to prove due to the distance and time gap or other combination factors. Therefore, several connection rules are used by the different legal systems, the most basic of which is *the condition sine qua non* rule, referred to in the Common law systems as the "but-for" test [15]. According to this test the damage is caused by all those facts without which it would not have occurred, that is if a certain damage might have occurred without the defendant's wrongful conduct, the defendant should not be held guilty. Two methods have been advanced to determine whether the defendant's acts or omissions are considered or not a *condition sine qua non* of the injury suffered, respectively the method of elimination and the method of substitution.

The "adequate causation" theory was subsequently developed, according to which the defendant's conduct not only has to be a condition of the injury suffered but also an adequate cause of such injury, in that it increased the risk of injury. To

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[13] In German law the concept is designated by the term "*Verkehrssicherungspflichten*";

[14] In relation to due diligence in environmental law see Thomas McMahon, "*The evolution of US due diligence*" in International Corporate Law, October 1994, nº 39, where due diligence is generally defined as the level of inquiry which is reasonable and appropriate under the circumstances;

[15] In relation to environmental damage caused by acid rains see Luis Colaço Antunes, "*Poluição Industrial e Dano Ambiental: as novas afinidades electivas da responsabilidade civil*" in Boletim ds Faculdade de Direito, vol. LXVII, 1991, who distinguishes between the "but for test", according to which the defendant's conduct is not a cause of the damage, if this might have occurred in any case and the "substantial factor test" under which the defendant's conduct constitutes the decisive element in the resulting damage;

evaluate this significant increase in the probability of harm all the circumstances perceptible to an "optimal" observer at the time of the incident and the specific conditions known by the defendant must be taken into account[16]. Many other theories have been defended, for example, the "scope of the rule" theory, but they are of less interest with regard to the compensation of environmental damage, since they were found to be too restrictive in establishing the causal link between this special type of damage and a certain polluter's activity.

Nevertheless, to deal with the problems of environmental damage certain adaptations were deemed necessary, since in some environmental cases either the damage is immeasurable or it is the result of cumulative acts, which makes it very difficult for the injured person to prove the causal link between the specific damaging act and the injury sustained. Furthermore, in other situations where the damage was caused by several acts of pollution, as for example the permanent deposit of waste, it is impossible to identify the individual producer of each polluting substance and therefore it is necessary to adopt specific mechanisms such as the joint and several liability criteria.

4.2.3.1. Joint and Several liability

In situations where several persons may be responsible for the same damage or for different parts of it, it may be very difficult for the plaintiff to prove the required causation links between the damage suffered and the activities of all those responsible persons or between a specific individual act and the share of the damage it caused.

Furthermore, in several other cases it happens that certain responsible parties are not at all identifiable or in the meantime have become insolvent. In all such cases, a

[16] See Markesinis, pp. 87;

proportional apportionment of liability among all the parties would not be efficient since it would not cover these responsible parties, and therefore their share in the damage would be paid by the injured person. If such apportionment were followed, not only would the internalisation goal not be achieved but the precautionary principle would be partially distorted.

In order to solve these difficulties in allocating liability, some systems establish that such liability will be joint, several or joint and several, thereby creating a fictitious apportionment of responsibility between the different parties.

On one hand, joint liability enables the plaintiff to sue only one or more of the responsible persons who will only be held liable for the share of damage actually caused by their individual polluting actions. On the other hand, joint and several liability implies that although a specific individual action has only caused part of the damage, the person responsible for such action is also responsible for the compensation costs due by other persons whose activities have contributed to the damage. The plaintiff's burden of proof is even further lightened by this rule, since he will only have to prove causation in relation to one of the responsible parties. If this party is held liable, it will be responsible for the full amount of damages to be compensated [17]. Under certain circunstances, the concept of joint and several liability can create an incentive for a whole range of potential polluters to take efficient precautions.[18].

Several criticisms have been made of the latter doctrine, namely that parties only responsible for a small share of the injury can be held liable for the entire amount of damages, which in environmental cases can reach very high sums. This

[17] See point 2.1.4. of the Green Paper;
[18] See Tietenberg who distinguishes between joint and several liability under negligence or strict liability systems and considers that only under the latter regime would a responsible party take more precaution, pp. 310;

disadvantage can be somewhat curtailed by including in an environmental liability system a right of contribution, which allows the party held liable to seek reinbursement from the other responsible parties who have not paid for their contribution to the damage [19].

Another criticism often made is that under joint and several liability the injured persons will tend to sue those responsible parties whose financial situation is better prepared to pay for any awarded compensation. This "wealth targeting" means that the defendants will be chosen from among the responsible persons who can better afford to cover the compensation or restoration costs even if they are not able to significantly prevent or reduce the risk of such damage [20].

Furthermore, some authors have considered that such wealth targeting may in some cases lead to an "unfair" primary allocation of responsibility to the so-called "deep-pockets". According to this "deep-pocket syndrome", the injured parties would take legal actions against the responsible party with the most financial resouces rather than the one that has caused most of the damage. Finally, this tendency to sue the "deep pockets" has raised concerns regarding the possibility of imposing liability on lenders, a situation that will be referred to next.

4.2.3.2. Lender Liability

As mentioned, the imputation on the original polluter may prove to be a difficult or inefficient means to obtain compensation, for example if he no longer exists or in the meantime has become insolvent. Thereby, there is a trend towards increasing the number of potential responsible parties, and several solutions have been adopted,

[19] Again Tietenberg considers that including the right of contribution in a joint and several liability rule would increase the amount of precautions taken and expected damages under the strict liability system but not under a negligence system;
[20] See Tietenberg, pp. 313;

varying from the establishment of compensation funds and compulsory insurance to the creation of "deep-pockets".

One kind of "deep pockets" are the banks or other types of lending institutions, which, having lent money to the polluter, may also be held liable under certain conditions [21]. The rationale behind such an approach is that banks are in a strategic position to prevent the development of certain environmentally-unfriendly projects [22].

The specific conditions under which financial institutions, namely banks, are held liable for their borrowers' polluting activities vary among the different legal instruments from the concepts of control to the understanding of their role as environmental policemen. As mentioned in the chapter on Community law, neither the proposed Directive on Civil Liability for damage caused by Waste nor the Green Paper provide for a secured lender exemption. Although they are still not binding legal instruments the main directions of environmental liability at the European level are to be found in the future interpretation of their provisions. If the references made to the person who is considered to have the "actual" or "operational" control over the polluting activity are interpreted in an extensive manner, banks may well be included among those responsible parties.

The consequences for a civil liability system may be disproportionate, with an increase in the price of the lending capitals, due not only to the banks being obliged to incur extensive environmental audits but also to the increased risks being included in the final price of money [23].

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[21] For a brief review of lenders liability in community law see Peter L.Tester and G.Marc Whitehead, "*The EC Directive on Civil liability caused by waste: lessons from the Superfund law*", in European Environmental Law Review, June 1992, pp. 26;
[22] See Christophe Nitsche and Chris Hope, "*Bank as policemen - money laundering and the proposed European environmental liability legislation*", in Research Papers in Management Studies, University of Cambridge, October 1983;
[23] See Derek Wheatley, "*A green caveat vendor*", in The Financial Times, 11/8/1992;

4.2.4. Damage

Last but not least, the requirement which should finally be mentioned is the one without which no civil liability may arise. In other words, liability only arises from an unlawful act if the plaintiff proves that a claimable damage has been caused to him. Likewise, under the different legal orders, only certain types of damages should be compensated for, depending on their quantitative or qualitative legal significance.

Furthermore, after proving that the damage should be compensated for the plaintiff and finaly the court still have to fulfill the difficult task of evaluating the damage.

4.3. NON-FAULT LIABILITY

The above-mentioned burden of proof on the plaintiff, who must establish the required link between the injury suffered and a particular defendant's faulty or negligent conduct, may sometimes be too difficult to fulfil. Even compliance with environmental regulations is not sufficient to prove that the potential polluter has acted in a proper manner.

Initially, to solve such problems several procedural mechanisms were used, from the reversal of the onus of proof to the doctrine of *res ipsa loquitor,* according to which the evidence of facts may relieve the victims from the burden of proof . These solutions have only led to an "objectivization" of negligence, merging fault and strict liability [24].

These situations then led to the adoption of strict liability rules according to which the polluter is held liable even if the damage he causes is not a result of his intentional or negligent conduct. Such a system will ease some aspects of the

[24] Infra note 5 , pp. 63;

plaintiff's burden of proof and the defendant's obligation to pay compensation may even arise from his lawful activities. For example, any person responsible for certain dangerous activities will bear the compensation costs from unavoidable damage and therefore the plaintiff will only have to establish a causal link between the injury sustained and the polluter's activities [25].

4.3.1. Absolute Liability

Absolute liability is a characteristic of a specific liability system, either fault or non-fault liability, according to which there is no possible defence or exclusion [26]. Theoretically, this prevents the creator of a risk from passing that risk onto the public and thereby expropriating the wealth from other people, because he will not be able to exempt himself from liability. The choice of adopting absolute liability depends on how the costs are apportioned between the party responsible for the pollution, the victim and the public in general.

4.3.2. Collective liability

As already mentioned, there are several types of pollution cases where it can be very difficult to establish the causal link between a certain activity or incident and the injury resulting specifically thereof, for example in cases of "synergistic pollution" where the pollution results from a combination of several different incidents or

[25] In the field of international responsibility see Riccardo Pisillo-Mazzeschi, "*Forms of international responsibility for environmental harm*", in International Responsibility for Environmental Harm, edited by Francesco Francioni and Tullio Scovazzi;
[26] See again Riccardo Pisillo-Mazzeschi, who considers that non-fault liability can be relative (or strict liability) or absolute depending on whether the defendant may invoke or not one of circumstances precluding wrongfulness allowed by international law;

activities [27]. If these different incidents or activities are the responsibility of different parties, how should liability be allocated among them ?

In fact, in the allocation of civil liability for environmental damage, difficulties may arise either because it is impossible to identify the specific responsible party, e.g. in cases of chronic pollution, or because in some types of pollution, e.g. waste dumps, linking the damage to the polluting substance can prove very difficult [28]. In such cases, the courts have developed different legal theories, most of them borrowed from product liability case-law, which provide more collective ways of compensating environmental damage [29]. It ought to be remembered that the final aim of liability rules is to compensate the injured person and that this objective should sometimes prevail over the "polluter pays" principle.

Therefore, the problems in proving the required causal links have led to the development of new forms of risk liability [30], which development has been explained by using the fiction of an overarching "cupola" which would replace the individualised causal attribution with a quasi-collective liability for environmental damages [31]. According to this theory, these new forms of risk "pooling" are achieved not only

[27] In relation to the Council of Europe Convention, see "*Explanatory report on the Convention on Civil Liability for Damage resulting from activities dangerous to the Environment*", commentary to article 11;
[28] See Alexandre Kiss, "*Present limits to the enforcement of state responsibility for environmental damage*", in International Responsibility for Environmental Damage, Chapter 1, who considers that one of the major obstacles to compensation for environmental damage is the requirement that the author of damage be identified in legal terms, which can prove very difficult in those situations of long-range transboundary pollution;
[29] In relation to the following forms of collective liability see Michael J. Harrigan "*Some concepts of Collective responsibility in US products liability and environmental situations*" in "Transnational environmental liability and insurance" by Ralph Kröner, 1993;
[30] See Glen O'Robinson, "*Risk, causation and harm*", in "Liability and responsibility: essays in law and morals", who considers that liability based on risk, that is, on the probability of harm, does not require one to accept probability as a statement of causation;
[31] Guntner Teubner, "*The invisible cupola: from causal to collective attribution of ecological liability*", Bremen/Firenze, to be published;

through an easing of the proof requirements but also by collectivising the defendant's responsibility; thus a polluter is not liable solely for his personal polluting activities but also for the acts of other members of the risk group to which he belongs.

Following, a brief summary of the main forms of collective responsibility, which exemplify the courts development of the variousl theories, will be given.

4.3.2.1. Alternative liability

This form of collective responsibility is used mainly in the situations where it is very difficult, at least not in an arbitrary basis, to allocate liability among the various responsible parties which contributed to the production of a certain damage [32].

In *Summers v. Tice* [33] the American Courts shifted the burden of proof to the defendants and founded them jointly and severally liable. Although the plaintiff could not identify the specific injurer, he sued and identified the set of all possible responsible parties. In such instances, this form of collective responsibility can be considered as an application of the joint and several concept under a system of strict liability.

In other words, the joint and several liability rule can at present be applied in situations where the independent acts of two or more parties produced the same indivisible damage. However, one of the difficulties encountered here is that all the potential responsible parties must be identified and sued, and therefore this concept has evolved into more flexible liability forms.

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[32] See Tom H. Tietenberg, "*Indivisible Toxic Torts: The Economics of Joint and Several Liability*", in Land Economics, vol. 65, nº 4, November 1993;

[33] The American case-law in this chapter will be mainly quoted from Harrigan, supra note ; 33 Cal.2d 80, 199 P. 2d 1, 1948; see also the new Dutch Civil Code, Section 6:99 where the requirement of causality between the polluting incident and the damage is relaxed;

4.3.2.2. Enterprise liability

This concept can be used to designate not only the liability of enterprises as separate entities but also a specific type of liability without fault [34], in which the courts relaxed to an greater extent the requirements for conscious, planned and purposive cooperation of enterprises [35]. In *Hall v. Dupont* [36] the Court also admitted a partial shift on the burden of proof by holding "that a group of manufacturers is jointly and severally liable if the plaintiff could prove that they had joint awareness of the risk and joint capacity to reduce the risk ".

One of the main disadvantages is that this type of collective liability does not cover those situations of parallel conduct among competitive individuals, thereby creating disincentives to risk control and to cooperation within the industry. Further difficulties are that in the targeted group "virtually" all of the industry manufacturers should be included, which would prove difficult if the industry in question is dispersed; therefore this type of liability has also developped into a less demanding type.

4.3.2.3. Market share liability

In reaction to the difficulties in collectivising liability of a widely dispersed industry, it was accepted in several cases that "if the plaintiff sued a sufficient number of manufacturers that constitute a substantial share of the market", then each defendant could be held severally liable to the extent of his market share [37]. In other

[34] See Gert Brüggemeier, "*Enterprise Liability for Environmental Damage in German Law and EC Law*" in Ecological Responsibility, Guntner Teubner (ed.);
[35] See again Guntner Teubner, Part A, Chapter 3, who considers that in the case *Hall vs. Dupont* the court identified a joint enterprise since there was joint control of the risk through common adherence to industry safety standards and the delegation of functions of safety investigation to a jointly sponsored trade association;
[36] Idem, 345 F. Supp. E.D.N.Y. 1972;
[37] See also Jan Ekering, supra note , according to which the producers held liable "fill the gap" of the market share of producers who have not been included as defendants or who have meanwhile ceased to exist;

words, whenever a firm enters a certain market it becomes responsible for the environmental risks that market creates [38].

For example, in *Sindell v. Abott* [39] the plaintiffs sued only five DES [40] manufacturers, but since these five were responsible for 90 % of DES production, the Court held that they could be held responsible in proportion to their substantial share of the product market. Nevertheless, in other DES cases, the Court referred to the need to demonstrate parallel action by the different manufacturing companies, a requirement which can be difficult to prove in certain cases [41].

Under this market-share rule, the traditional causal connection requirement will not serve its deterrent function since the plaintiff does not have to prove a causal link between the defendant's conduct and the injury suffered. Nevertheless, in product liability case-law the fulfillment of the following pre-requisites was considered necessary: that the risk of the products should be identical, that potential victims should have been subjected equally to this risk, and finally that all the risks can be accurately estimated [42]. The main problems of this rule are how the damage should be apportioned among the various defendants and whether the background level of risk should be taken into account by the court.

4.3.2.4. Risk Share Liability

[38] See again Guntner Teubner ;
[39] *Sindell v. Abott Labs*, 26 Cal. 3rd 588, 607 P2d 924, 1980;
[40] DES stands for Diethylstillbestrol, that is synthetic hormone, oestrogen, used in complicated pregnancies; due to the time gap the DES daughters were no longer able to identify the manufacturers that made the particular pills taken by their mothers;
[41] See Luis Colaço Antunes, Chapter 4, refering to Case *Bichler vs. Eli Lilly & Co* where the Court decided for the solidary liability of all those who agreed to commit an illegal act which agreement could be deduced from the conscious parallelism of the infringers' conduct;
[42] See Susan Rose-Ackerman, "*Market-share allocations in tort law: strenghts and weaknesses*" in Journal of Legal Studies, vol. XIX, June 1990;

In a more radical formulation of the market share liability theory some American Courts have even adopted the theory that the plaintiff needs to sue only one possible responsible party, which is then held liable if it does not bring into the action the other possible defendants. For example in *Collins v. Squibb* [43] the Court of Wisconsin based this theory on the idea that each manufacturer who contributed to the risk of injury could be held totally responsible, unless he identified and brought into the case the other possible defendants.

According to some doctrine, CERCLA [44] would be a regulatory example of this risk share theory, since all "potentially responsible parties" ("PRP's") who dispose of hazardous substances to the site in question can be held liable for the entire damage, because they contributed to the risk of harm.

[43] Wis. 2d 166, cert, denied, 469 U.S. 826, 1984;
[44] Comprehensive Environmental Response, Compensation and Liability Act ;

CHAPTER 5

COMMUNITY LAW

5.1. - INTRODUCTION

As already mentioned when discussing the Community law definitions of environmental damage, it was only after the Single European Act [1] that the Community formally adopted a planned environmental policy. In fact, when the European Community was founded in 1957 with Treaty of Rome the protection of the environment was not referred to and it was only with the SEA that the Community's environmental objectives were established, mainly in article 130r; these objectives consisted in: a) preserving, protecting and improving the quality of the environment; b) contributing towards the protection of human health and c) ensuring a prudent and rational utilisation of natural resources [2].

The Community competencies in the environmental field will not be analysed in detail here, since this subject has already been extensively dealt with by several other works [3], and also because the central focus of this thesis is on the potential European environmental liability regime and not on the characteristics of Community Environmental Law. Nevertheless, a brief analysis of the Maastricht Treaty and the

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[1] Single European Act, 1987 OJ L 169, 1, hereinafter SEA;
[2] See for a more detailed analysis of the impact of the amendments put forward by the SEA, Nigel Haigh and D. Baoldock, "*Environmental Policy and 1992*", IEEP, 1989;
[3] Eckhard Rehbinder and Richard Stewart, "*Environmental Protection Policy*", vol. 2, 1985; Ludwig Krämer, "*Focus on European Environmental Law*" ;

most important changes it has introduced into Community environmental will be given, in order to broadly describe the framework under which future Community environmental legislation will be adopted or interpreted.

5.2. THE MAASTRICHT TREATY AND COMMUNITY ENVIRONMENTAL LAW

5.2.1. Introduction

Following the starting point given by the Single European Act, the Treaty on European Union stresses the former explicit references to the protection of the environment by amending some of its main principles. Nevertheless, it is considered by some observers that the Maastricht Treaty represents a "two steps forward, one step back " approach in the development of the EEC's environmental policy [4], and therefore it is worthwhile analysing the main changes and their possible impact.

In fact, although it seems at first glance that the amendments made to former Title VII on the Environment are more of a formal than of a substantial nature, this is not sot. First of all, a concrete Community policy on the environment is recognised, replacing the former reference to "action by the Community relating to the environment", which was understood by some as only enabling sporadic interventions by the Community. As in the SEA, this environmental policy should contribute to the increase in the quality of the environment, to the protection of human health, and to a prudent and rational utilisation of natural resources.

5.2.2. Sustainable growth

[4] See David Wilkinson, "*Maastricht and the Environment: The implications for the EEC's environment policy of the Treaty on European Union*", in Journal of Environmental Law, 1992, vol. 4, nº 2, pp. 221;

The main change is that the amended Treaty establishes the Community's duty to promote a "sustainable and non-inflationary growth respecting the environment" and the "raising of the standard of living and quality of life" thereby enlarging the scope of the EEC's basic tasks [5]. Finally, the amended reference to the promotion of measures at the international level translates the Community trend towards encouraging a more important role for the international organisations and the agreements whose adoption they promote, in dealing with environmental questions [6].

5.2.3. Subsidiarity Principle

Another relevant provision to the development of an efficient Community environmental policy is the extension of the principle of subsidiarity to all Community activities [7]. According to this principle the EEC's intervention shall be confined to those areas where this is more effective than national intervention and in any case shall be kept to the minimum extent necessary [8]. Thereby, the formal partial principle, establishing that action in the environmental field by the Community was subject to the condition that the proposed objectives could be better attained at Community rather than at individual Member State level, was substituted by a general principle of subsidiarity [9].

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[5] See article 2º of the EEC Treaty as amended by the Treaty on the European Union, hereafter the Maastricht Treaty; It is interesting to note the comparison between the term adopted of "sustainable growth" and the term used in the 1987 Report of the Bruntland Commission of "sustainable development;

[6] See also Joint Public Hearing on the Draft Directive for Liability caused by Waste, in which the possibility of the EEC's adhering to the recently approved Council of Europe Convention on Compensation for Damage to the Environment was questioned;

[7] Article 3b of the Maastricht Treaty;

[8] For a more detailed analysis of the principle of subsidiarity see Rénaud Dehousse, "*Does subsidiarity really matter*", EUI Working Papers in Law 92/32, January 1993, according to which the rationale behind such a principle was to limit the growth of Community powers by taking decisions "as closely as possible to the citizen";

[9] See Article 130r/ 4 of the EEC Treaty as amended by the SEA;

In the environmental field the Community has followed a type of administrative subsidiarity according to which the legislation adopted usually sets a regulatory framework within which Member States interpret and establish the specific requirements [10]. At the same time, the Treaty, by giving Member States the right to maintain or introduce more stringent protective measures [11], as long as these are notified to the Commission and compatible with the Treaty, allows considerable differences in each Member State's national standards of environmental protection [12].

5.2.4. States Aids and other Financial Aids

The only amendment to article 92, regarding state aids does not make it very clear whether the aids granted in the environmental field are to be justified under n° 3 b) or the new n° 3 d) [13]. Since this new point d) considers that any state aid to "promote culture and heritage conservation" is compatible with the common market insofar as it does not affect "trading conditions and competition in the Community to an extent that is contrary to the common interest", some doubts will probably arise as to the grounds on which a specific aid should be based. The justification for future subsidies or grants given by Member States in order to increment the effective implementation of environmental standards will have to be analysed case by case.

5.2.4.1. Cohesion fund

[10] See David Wilkinson, pp. 226;
[11] See article 100a/ 4 as amended by the Maastricht Treaty;
[12] See Rénaud Dehousse, Christian Joerges, Giandomenico Majone and Francis Snyder, "*Europe after 1992 - New regulatory strategies*" in EUI Working Papers in Law /93, according to which the more the EEC uses general rules, the more difficult it is to ensure the uniformity of their substantive implementation within Member States;
[13] See Daniel Alexander, "*Competition, subsidy and environmental protection*" in EC Environment and Plannig Law, Chapter 15, according to which these financial aids must actually involve the expenditure of state resources and may be considered exemptions to the polluter pays principle;

Furthermore, Community financial contributions to the objectives established in its environmental policy are now covered by article 130 d) [14], which obliges the Council, acting in accordance with the referred co-decision procedure, to establish a Cohesion Fund responsible for providing certain financial contributions for approved projects in the field of environment and transport infrastructure in Greece, Ireland, Portugal and Spain, to cover their increased costs due to the introduction of higher environmental standards.

5.2.4.2. Derogation

The new provision on temporary derogations may be understood as an indirect financial contribution from the Community. In fact, when the Community, following the normal procedure, adopts a certain measure that implicates disproportionate costs to the Member State's public authorities, the latter may seek a temporary derogation [15].

5.2.5. The Basic Principles and the Precautionary Principle

Notwithstanding these changes, the Community policy continues to be based on the "basic triad principles" [16] that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay.

In addition to these basic principles, the precautionary principle is also included; this is reflected in the Community's obligation to aim at high level protection, maybe as a confirmation of former article 100a(3). This principle can also be seen in the fact

[14] The articles referred to if not stated otherwise, are from the EEC Treaty as amended by the Treaty on the European Union;, hereinafter the Maastricht Treaty;
[15] See article 130s/ 5 as amended by the Maastricht Treaty;
[16] Michael Scott Feeley, Peter M. Gilhuly and Reginald K.S.Ammons, "*W(h)ither goes the EEC proposed Directive on Civil Liability for Waste*", 15 Boston College International and Comparative Law review, 1992, pp. 241;

that other Community policies must take environmental protection requirements into account[17]. In other words, from now the definition and implementation of the other EC policies will include environmental priorities and a high level of protection has been extended to all environmental measures [18].

5.2.6. The Legislative Process

Another relevant innovation that confirms the Treaty on European Union as an important step towards the deepening [19] and improvement of Community environmental law is the provision indicating that the Council will normally adopt environmental legal instruments by a qualified majority voting, where votes are weighted roughly in accordance with each Member State's population [20].

The main advantage to extending the scope of the rule of qualified majority is that it renders it difficult for a single Member State to veto a legislative proposal thereby easing the adoption of more stringent environmental rules. However, this qualified majority vote and its consequent advantages are excluded where the provisions to be adopted are of a fiscal nature, concern town and country planning, land use, management of water resources and/or energy supply [21], unless contrarily defined by the Council acting in accordance with the co-operation procedure [22].

The use of this "co-operation procedure" [23], according to which the Members of the European Parliament are given a second reading of legislative proposals, was

[17] See article 130r/ 2 as amended by the Maastricht Treaty;
[18] The scope of a high level of protection was extended because article 100a of the SEA required it in the harmonisation of measures affecting the internal market;
[19] See Giandomenico Majone, "*Deregulation and re-regulation: policy making in the EC since the Single Act*" in EUI Working Papers in SPS nº 93/2 afirming that one of the indicators of a qualitative deepening of EC regulation is this introduction of qualified majority voting for most environmental legislation;
[20] See article 130s as amended by the Maastricht Treaty;
[21] See article 130s/ 2 as amended by the Maastricht Treaty;
[22] See article 130s/ 1 as amended by the Maastricht Treaty;
[23] See article 189c as amended by the Maastricht Treaty;

also extended and generalised. Furthermore, a new complex form of "co-decision" procedure [24], which applies in cases of general action programmes and for measures aiming at establishing the internal market [25], was adopted, allowing an absolute majority of the Parliament to veto specific legislative proposals. It is, however, questioned whether this procedure represents an enlargement of the Parliament's role and a facilitation in the adoption of environmental measures or if it may well mean greater delays in the adoption of specific environmental legislation.

To sum up, the co-operation procedure with the Parliament in combination with the rule of qualified majority voting in the Council has become the normal legislative procedure in the adoption of environmental legislation [26].

5.3. THE EVOLUTION OF ENVIRONMENTAL LIABILITY RULES

It is likely that the idea for a Directive on Environmental Liability originated earlier in the Council of Environmental Ministers, when, in reaction to the Sandoz accident, it stated that liability law was a key element for achieving greater environmental protection [27] and thereby urged the Commission to examine the situation and the problems of the European system of civil liability for environmental damage [28]. Soon afterwards, the European Parliament also recommended that the Commission

[24] See article 189b as amended by the Maastricht Treaty;
[25] See respectively article 130s and article 100a as amended by the Maastricht Treaty;
[26] For a more detailed analysis of the different EC's legislative procedures see Wilkinson, Appendix 1, pp. 235;
[27] Council of Environment Ministers in 5/11/86, Bull. EEC 11-1986, point 2.1.146: "key elements to be pursued in a bilateral Community, or multilateral framework, in achieving better environmental protection of other major waterways affecting the Community should be prompt clean up, restoration and equitable compensation and liability arrangements for pollution damage of those who originated it" ;
[28] See Council Resolution of 24/11/86, cited in point 1 of the Explanatory Memorandum;

proposed a Community system of fault liability, focusing mainly on high risk operations involving chemicals and high risk activities [29]. These reactions were mainly a response to the stronger public demand for more efficient systems of accountability and compensation of the damage to the environment [30].

These developments culminated in their formal inclusion in the 4th Environment Action Programme (1987-1992) where the Commission was compelled to redefine responsibility for environmental damage [31]. More recently, the 5th Environment Action Programme, approved in December of 1992, specifically envisages the harmonisation of environmental liability law regarding all types of pollution [32].

5.3.0.1. The Polluter Pays Principle

The "polluter pays" principle has been considered a fundamental canon since the 1st Environment Action Programme, which stated that nuisance prevention and elimination costs should, in principle, be supported by the polluter [33]. However, it should be added that the interpretation of this principle has developed as has European integration [34].

On the one hand, the first explicit reference in the Treaty itself to the importance of compensation through liability law can be seen in the formal insertion of the

[29] European Parliament Resolution on Action to Take Concerning Recent Pollutant Discharges in the Environment of the Rhine, Dc. B2 - 1259/86, OJ C 7 of 12/10/1987, pp. 116;
[30] For a more detailed report of the evolution of environmental liability law in the Community see point 2.2.3. of the Green Paper ;
[31] This commitment is considered a restatement of the provision on the strict liability of the waste producer, contained in the initial proposal for the Directive 84/361 on Transfrontier Movement of Hazardous Waste;
[32] Commission of the European Communities, *"Towards Sustainability: A European Community Programme of Policy and Action in relation to the Environment and Sustainable Development"*, 1992;
[33] See 1st Environment Action Programme, J.O.C.E. 112 of 20/12/73;
[34] See for the evolution of the principle regarding the increasing importance given to environmental liability Chapter 3, paragraph 3.3.;

"polluter pays" principle in the Treaty of Rome by the Single European Act [35], according to which environmental costs should be internalised so that they are fully accounted for in the price of goods and services. In other words, under the polluter pays principle the environment will acquire a financial value which is taken into account as part of the manufacturing process in the same way as other raw materials [36].

All these developments took into account the current state of Community law and its Member States' national laws, which usually provide diverse and sometimes weak substantive rules not guaranteeing an efficient and adequate compensation for environmental damage. The differentiation of national liability systems is considered by most to distort the competition rules and endanger the accomplishment of the single market, but a further consideration of these problems is not the main focus of this work [37].

5.3.0.2. Partial Harmonisation of Liability Law

Although the Community recognised the need for a uniform regulation of environmental law, it decided to begin with only a partial harmonisation of liability law, within the framework of European Waste Regulation [38]. Several criticisms were made of this partial harmonisation, and even the Commission itself recognised that certain aspects of environmental liability law should not be regulated only in relation to waste

[35] Article 25º of the SEA, now article 130(r)º of Treaty of Rome;
[36] See Clifford Chance, "*European environmental law guide*";
[37] See point 1 of the Green Paper;
[38] The main Community instruments in this field are the EEC Council Directive 75/442 on Waste, the EEC Council Directive 78/319 on Toxic and Dangerous Wastes including both the proposed amendments of 1988 and 1989, the Commissions Communication SEC(89) 934 final of 18/9/89 on a Community Strategy for Waste Management; and the EEC Council Directive of 6/12/84 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste as amended in 1986, (hereinafter Directive on Waste Shipment);

damage, as, for example, the possible implementation of an European Compensation Fund to pay for general environmental damage [39]. In fact, the harmonisation of environmental law has for long been perceived as necessary, in order to eliminate distortions of competition caused by the differences in the national solutions [40].

On the one hand, it is generally understood that wastes are harmful because of their nature and/or of their accumulative effect and therefore any environmental policy should aim at their reduction, recycle or their elimination. It should usually be the producer who guarantees this adequate treatment of its own waste in order to suppress any harmful characteristics [41]. On the other hand, the high percentage of damage to public health and to the environment caused by industrial waste pollution and waste sites is likely to have been one of the reasons for the urgent need for regulation on liability in this particular field [42]. This concern had already been formally recognised in the 1984 Directive on Waste Shipment, where the Council committed itself to adopting a Directive on Civil Liability caused by Waste [43].

As a result, the draft Directive on Civil Liability for Environmental Damage Caused by Waste and another draft Directive on the Landfill of Waste, which includes certain liability provisions, were proposed by the Commission [44]. The difficulties

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[39] See point 10 of the Explanatory Statement;
[40] For a more detailed description of the reasons and types of harmonisation see Eckard Rehbinder and Richard Stewart, "*Environmental Protection Policy*", vol. 2, Chapter VIII, Part A;
[41] See Patrice Level, "*Proposition du Directive CEE du Conseil concernant la responsabilité civile pour les dommages causés par les dechets*" in Revue des Affaires Européenes, Paris, 1991, nº 4, pp.35;
[42] See Explanatory Statement of the European Parliament 1st Report of 29/5/90, Doc. A3-126/90/Part B, SYN 217;
[43] Article 11(3) of the Directive on Waste Shipment, which states: "The Council shall, acting in accordance with the procedure referred to in article 100a of the Treaty, determine no later than the 30 September 1988 the conditions for implementing the civil liability of the producer (of waste) in the case of damage or any other person who may be accountable for the said damage and shall also determine a system of insurance";
[44] See draft Directive on the Landfill of Waste , OJ nº C 190, 220/91, pp. 1;

encountered during the decision-making process of these proposals have led the Commission to reconsider the question of environmental liability in general, by adopting the so-called "Green Paper"[45].

5.3.0.3. Civil Procedural Law

As is known, civil liability regulation and the definition of its limitations are in most Member States closely linked with procedural law, and therefore a uniform system of liability rules necessarily means a certain harmonisation of the civil procedure regimes [46]. Although such interdependence is now largely recognised, Member States have to date considered that procedural law comes under the exclusive competence of the national legislator, and have not been willing to accept harmonisation in this field [47].

It was only with cases such as the *Thalidomide* case that the Community felt the need to regulate certain aspects of procedural law, namely those regarding the situations of product liability law [48]. The provisions of Directive 85/374, by failing to ease the plaintiff's burden of proof, made it difficult for any potential plaintiffs to prove the causal connection between their injury and the defendant's conduct. In the

[45] Green Paper on Remedying Environmental Damage - Communication from the European Commission, COM(93) 47;
[46] Confirming the need for legal harmonisation, both at substantive and procedural levels see Alan E. Boyle, "*International Law and Transboundary Acess to Environmental Justice*" in the Conference Acess to Environmental Justice in Europe held in 18/4/94 at the European University Institute, who considers that such harmonisation may contribute to simplify the burden facing transboundary plaintiff and clarify the responsibilities of transboundary defendants;
[47] See Ludwig Krämer, "*Focus on European Environmental Law*", Chapter 12, who considers that the law of judicial procedures is regarded as out of bonds by existing national systems and that it is not felt that there is a true need to harmonise and reform existing rules;
[48] In relation to product liability see Christian Joerges in "*European product safety, internal policy and the new approach to technical harmonisation and standards: The juridification of product safety policy*", according to which the manufacturers of defective products should be subject to strict liability as a form of "compulsory insurance of consumers against particular hazards involved in the use of products;

Thalidomide case the result was that the court was unable to ascertain liability on the part of the producer of the drug [49].

5.4. THE PROPOSAL FOR A COUNCIL DIRECTIVE ON CIVIL LIABILITY FOR DAMAGE CAUSED BY WASTE [50] AND THE GREEN PAPER

The Directive on Civil Liability for Damage Caused by Waste was drafted to harmonise the Member States' legislation in order to promote the following objectives: a) to encourage producers to reduce and monitor their production and disposal of waste - the "prevention" goal -[51] b) to ensure fair compensation for victims of environmental harm - the "compensation" goal -[52]. c) to promote the internalisation of the societal costs related to the production of waste by encouraging producers to include the indemnification costs in the price of the products or services causing the polluting waste - the "internalisation" goal [53]. This last goal, by aiming at including the costs of covering the risks of environmental liability in the prices of the respective products or services, may be considered as distorting the implementation of the "polluter pays" principle. In fact, the producers of the waste that caused the environmental damage will, by including those liability costs in the final prices of the

[49] Ludwig Krämer in *"Compensation for disaster damage and community law"* in Focus on European Environmental Law;
[50] Commission Original Proposal for a Council Directive on civil liability for Damage caused by waste, COM(89) 282 final - SYN 217 in OJ nº C 251, 4/10/89, pp. 3; ; Commission Amended Proposal n OJ nº C192, 23/7/91, pp. 6;
[51] See point 3 of Explanatory Memorandum and ;
[52] See point 2 of the Explanatory Memorandum, *supra* note ; also Feeley *supra* note ; Sheehan; , *"The EEC's Proposed Directive on civil liability for damage caused by waste: Taking over when prevention fails"*, in Ecology Law Quarterly, vol. 18, 1991, nº 2, pp. 405 - 458;
[53] See point 5 of the Explanatory Memorandum;

goods, transfer such costs to the final consumer, thereby giving rise to a new "polluted pays" principle [54].

An integrated analysis of the proposed civil liability regime follows, comparing the initial draft provisions with the amended proposal submitted by the Commission [55]. The amendments suggested by the European Parliament [56] and the opinions of the Economic and Social Committee [57] are also taken into account [58]. Furthermore, the analysis will try to compare this proposal to the recently promulgated Green Paper, since not only does it represent the Commission's last position towards environmental liability, but it is also a result of the difficulties encountered throughout the discussion of the draft Directive [59].

Taking into account the long and difficult path that this proposal has been following there may be some truth in the informal signs indicating that this draft Directive will not be adopted at all but will instead be incorporated into a future Directive on Environmental Liability in General. Nevertheless, discussion of this proposal should not be considered as being in vainas being in vain, since not only has it contributed to the Green Paper conclusions, but it has also illuminated the way for the Member States' legal systems.

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[54] See Andrew Bryce, *"Control of waste: existing rules and requirements and the proposed directive on civil liability on waste"* in EEC Environment and Planning Law, ed. by David Vaughan Q.C.;
[55] Civil Liability Directive;
[56] European Parliament, Committee on Legal Affairs and Citizen's rights 1st Report of 29/5/90, Doc A3-0126/90/Part A and B, SYN 217 and 2nd Report of 5/11/90, Doc A3.0272/90;
[57] See Opinion of the Economic and Social Committee (ESC), OJ nº C 251, 4/10/89, pp. 3;
[58] Explanatory Memorandum of the Amended Proposal;
[59] On the characteristics of the Green Paper the speech of Béatrice Thomas, *"A propos de quelques réflexions sur la responsabilité civile pour la réparation des dommages à l'environnement"* in the Conference on "Insurance for Environmental Damage" stating that the main objective of such instrument is to specify all the theoretical and practical aspects on the compensation of environmental damage and to propose different possibilities of environmental liability systems;

Since the beginning of the first discussions about this draft Directive, most Member States have either stopped approving any regulations on the subject of environmental liability or have adapted their legal concepts to those which have been proposed by the Community. If a general Directive on Environmental Liability is to enter the "European arena", it is clear that the five years of continous effort will not be disregarded and that the conclusions and solutions that have been reached will be taken into account.

This comparative approach should throw some light on the problems and limitations that the Community encounters when proposing a uniform civil liability regime throughout its Member States. The different reactions to the difficulties encountered not only reflect the permanent conflict between the industry-oriented positions and the more environmental friendly views on the problem, but they also restate the continuous debate about the different possible structures and characteristics that a civil liability system for environmental damage may have.

5.4.1. Scope of the Proposed Directive, and of any potential Directive on Environmental Liability

In broad terms, the draft directive aims at being applicable to every waste containing or contaminated by certain substances or materials that in a certain quantity or concentration are a risk to health and to the environment [60]. Thereby, the producers of such wastes, if generated within or imported into the EEC, are to be held liable for the damage caused wherever this damage occurs [61].

[60] Directive on Toxic and Dangerous Waste 78/319/EEC, article 1º/b);
[61] See Article 1 of the Amended Proposal and Explanatory Memorandum;

Furthermore, the Commission accepted one of the suggestions of the Parliament, which was to include the exclusive economic area of the Member States in the geographical scope of the final proposal.

5.4.1.1. Definition of environmental damage

As already mentioned [62], the Commission divided into two the categories of damage and injury to the environment, especially because of the difficulties in quantifying environmental damage as such. The liability for damage to individuals includes not only their physical injury but also their death and damage to their property, the latter including both its deterioration and destruction [63].

In the amended Proposal the Commission adopted the Parliament suggestion to substitute "injury to the environment" by "impairment to the environment" [64], which now means any "significant physical, chemical or biological deterioration of the environment". The Parliament was of the opinion that the concept of impairment should include the situations of continuous pollution but the Green Paper questions whether this last definition includes less significant impacts on the environment, for example those continuous forms of pollution that gradually deteriorate the environment [65].

5.4.1.2. Types of waste to be covered by the Directive

The idea that the scope of the Directive is directly connected to the definition given to the term waste has raised some doubts. The draft Directive defines waste by referring to the definition given by the Council Directive 75/442 according to which

[62] See Chapter 1, II/a on the definition of environmental damage;
[63] Explanatory Memorandum;
[64] See supra note 20;
[65] See point 2.1.7 of the Green Paper;

waste is "every substance or object whose owner has to get rid of according to the provisions of national law" [66]. However, since a new Directive on Waste [67] was approved in 1991, maybe its enlarged definition of waste should be taken into consideration and the draft Directive amended accordingly.

By not distinguishing between hazardous and non-hazardous waste, the draft Directive aims at covering all types of waste, with the exception of nuclear waste and waste caused by oil pollution [68]. This non-distinction was the target for one of the Parliamentary criticisms which suggested that the definition of waste was too broad and that the Directive should not apply to non-hazardous waste. Although the ESC also considered this definition too broad, its reasons were that the Directive did not distinguish between recyclable and non-recyclable waste. The rationale behind the importance given to this last distinction is that waste handed over for recycling supposedly poses less risks than any other type of waste and therefore such "environment friendly" technologies should not be penalised [69]. The Committee further suggested that liability should end when the waste is "handed over for recycling", but regrettably did not clarify whether the recycler should be liable for any environmental damage that his faulty conduct might cause [70].

5.4.1.3. Exclusions from the scope

Finally, in order to avoid the overlapping of its liability rules with other existing liability regimes, the draft Directive excludes from its scope nuclear waste and

[66] See Directive 75/442 on Waste, J.O.C.E. L194 of 15/7/1975;
[67] See Directive on Waste, J.O.C.E. L 78 of 26/3/91;
[68] In the Original and Amended Proposal;
[69] However, Pierre V.F.Bos, "*The proposed Regulation on the Supervision and Control of Movement of Waste: some comments*" in EC Environment and Planning Law who believes that both recyclable and non-recyclable waste give rise to the same problems in the light of the protection of the environment and applying distinct regimes would violate the principle of non-discrimination;
[70] See paragraph 4 of the Opinion of the European and Social Committee;

pollution caused by hydrocarbons, as where such pollution cases are covered by the relevant International Agreements in force in the Member States [71]. Nevertheless, the Parliament was of the opinion that since impairment to the environment caused by nuclear waste is not covered by the Paris Convention [72] it should not be excluded from the scope of this Directive [73] but this suggestion did not prevail in the final draft.

5.4.1.4. Scope of a possible Directive on Environmental Liability in General

The Commission acknowledged in the Green Paper that any liability system needs to specifically determine its scope, for example by clearly defining the polluting activities and/or substances to which such a system shall be applied. The reasoning against the feasibility of such definition is that it is difficult to legally determine which activities should be subject to strict liability. These reasons are not, however, sufficient since legal certainty in this field should prevail over legal flexibility, meaning that potentially-liable parties must have this legal certainty in order to know the exact consequences of their activities and to plan any future preventive and compensating measures if damage occurs.

Regarding the possibility of a general Directive on Environmental Damage, if a strict liability regime is to be adopted the Green Paper suggests the factors which will have to be considered in determining its scope. Among the factors concerning a specific polluting activity that should be analysed are the types of hazard it may pose,

[71] See article 1º/2 and article 12º of the Amended Proposal;
[72] Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 26/7/60; and the Brussels Convention of 31/1/63 and the Protocols attached to these conventions;
[73] See indent 4 of the Explanatory Statement to the Parliaments 2nd Report;

the probability and extent of damage it may cause, and the feasibility of compensating for such damage.

Furthermore, whether a certain activity is to be made subject to a no-fault liability system depends on whether such a regime induces economic operators to manage their pollution risks and/or to prevent environmental damage more efficiently and on whether the financial burden on the activity sector is not so heavy as to stifle future investment. As already mentioned, a general regime which is too broad in scope may unjustly penalise certain types of dangerous activities but on the other hand a system whose scope is too narrow may distort the "polluter pays" principle by improperly allocating the costs of repairing environmental damage. In other words, a regime whose scope is too narrow will ignore the usefulness of the "polluter pays" principle, by allowing the loss to lie where it falls under the principle of *causum sentit dominus* [74].

5.4.2. Principles of Liability

5.4.2.1. Strict liability or fault liability

By imposing strict liability for physical injury, damages to property and injury to the environment caused by waste, the Directive follows the current tendency in the Member States [75] and at Community level [76] to substitute the traditional fault with strict liability principles [77]. Furthermore, the proposed civil liability rules will, to a certain extent, be complemented by and complementary to with the products liability

[74] See Brüggemeier, in Ecological Responsibility, Guntner Teubner (ed.);
[75] See for a brief survey on the recent evolution in Member States and international law towards strict liability for environmental damage, point 2.2.1 and 2.2.2. of the Green Paper;
[76] See Directive 85/374 on defective products and Proposal for a Waste Directive;
[77] See also point 4 of the Explanatory Memorandum;

law; their interpretation should take into account the developments in products liability law, namely the new concepts of risk liability [78].

As the Green Paper has efficiently summarised, a fault-based liability system would impose an over heavy burden on the plaintiff since he has to prove that the polluter's action which caused the environmental damage was wrongful. In other words, the plaintiff would have to establish that the defendant, by committing a negligent or intentional unlawful polluting act, was at fault [79]. Although in Member States national law, the concept of fault varies according to their different civil liability theories, in general terms it can be said that someone acted with fault if he intended to cause damage or if he did not take sufficiently care to avoid such damage. The latter concept of negligence has been the subject of several doctrines which discuss whether the polluter should know or not know of the possibility of causing damage and also at what point careless is to be considered as negligence.

Under certain fault liability regimes, the fault of the polluter can be established by proving that he had breached a certain duty of behaviour. Although the faulty infringement of such duty can be proved by simply establishing that the polluter's actions have breached a specific environmental statute, not all damage to the environment is previously and specifically evaluated by statute provisions. Therefore, the plaintiff may still find it difficult to prove that the polluter acted wrongfully and, consequently, to obtain compensation or restoration for the environmental damage [80]. Since the recent evolution in the concept of fault is based more on positive environmental regulation and less on the moral judgement of the polluter's behaviour

[78] See Hans-Dieter Sellschopp, *"Multiple Tortfeasors/combined polluter theory, causality and assumption of proof/statistical proof, technical insurance aspects"* in Transnational Environmental Liability and Insurance by Ralph P. Kröner;
[79] See point 4.1.1. of the Green Paper;
[80] See point 2.1.1 of the Green Paper;

[81], such a system does not always guarantee an effective implementation of the polluter pays principle.

On the contrary, according to those who support the substitution of this liability system, the semi-automatic character of no-fault liability for environmental damage is more in line with the effective application of the polluter pays principle and the long-term accomplishment of the internal market . In broad terms, strict liability is considered more effective for environmental protection since it eases the burden of proof on the plaintiff more than do those special mechanisms which are being introduced in some fault liability systems, for example the shifting of the burden of proof under certain conditions. Under this no-fault system the plaintiff will not have to prove that the defendant acted with fault, but will simply have to establish the causal link between the injury suffered and the polluting activities. This means that it should be easier to allocate the compensation costs to the polluter who actually caused the environmental damage, instead of "leaving the loss to lie where it falls" because of the difficulties in proving faulty behaviour [82].

This is not the place to describe the pros and cons of both types of liability systems [83]: however it should be said that strict liability has also been adopted in order to strengthen the prevention purpose, by motivating waste producers to dispose legally of their wastes and thereby avoiding future potential damage. Not only should it increase these "incentives for better risk management" but, if several of its elements are efficiently defined, it means that civil liability can become a coherent environmental protection mechanism in which polluting activities can operate according to established guidelines.

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[81] See David Wilkinson, *"EEC Green Paper on Remedying Damage to the Environment"*, in European Environmental Law Review, June 1993, pp. 159;
[82] See point 4.1.2 of the Green Paper;
[83] Which is done in Chapter 4 on a comparison of different civil liability systems;

5.4.2.2. Responsible party

For the Commission, the primary responsibility lies with the producer, who is defined in the initial proposal as "any natural or legal person whose occupational activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste" [84]. This liability system is justified by the notion of professional risk [85] based on the producer's responsibility for the elimination of its own wastes. These "original producers" [86] are to be held liable until they have legally transferred their wastes to a licensed treatment or disposal facility [87].

The Commission justified this primary attribution of liability to the producer by considering that he is the economic operator with the best and most direct knowledge of the nature, composition and characteristics of the waste and thereby the person in the best position to avoid any environmental damage by his waste. Finally, according to the Green Paper, the channelling of liability should be an efficient and equitable solution to the problem of the distribution of costs and should contribute to the prevention role of strict liability [88]. Therefore, the Green Paper considers that it is more effective to channel liability to the party with the best technical knowledge, larger resources and effective control of the activity [89].

In order to ensure that the identification of the responsible person is always possible, the provisions define the "producer" as the importer of the waste into the

[84] Supra Original Proposal, article 2º/1 a);
[85] See 8th Recital of the Amended Proposal Preamble;
[86] See Feeley, supra 6;
[87] See Original Proposal, article 2º/2 c);
[88] See Green Paper, pint 2.13.;
[89] See Green Paper, item 4.1.2;

Community [90], the person who at the time of the incident had effective control of the waste and/or the person responsible for the site to which the waste has been lawfully transferred, unless these persons identify the actual producer.

However, such a "producer pays" principle has been criticised by the Parliament and the ESC, which considered that the licensed carrier or disposer with the "actual" control of the waste, at the moment in which the incident occurred, should also be subject to primary responsibility. It was also added that the liability of these new responsible parties should end when the waste was legally transferred to an authorised waste disposal facility [91], according to provisions of the Directive on Waste [92].

5.4.2.2.1. Eliminator of Waste

In fact, in the amended Proposal the Commission also included the Parliament's suggested concept of eliminator of waste [93], who will be held liable unless he can prove that "in the absence of fault on his part, the producer deceived him as to the true character of the consignment of waste". In other words, the eliminator of waste may exclude himself from liability if he can prove the misstatement of the producer regarding the nature of the waste or the type of treatment envisaged.

Thereby, persons such as the carrier or other disposers, who may at some time have had effective control of the waste, have no separate liability, since the producer is held primarily liable for any damage caused by these persons. This encourages the producer of waste to verify that the eliminator he chooses has all the administrative

[90] See article 2º, paragraph of the draft Directive; for a similar identification see the Directive on Product Safety of 25/7/1985;
[91] 11th recital of the Amended Proposal's Preamble and article 2/2 c)
[92] See Directive 75/442 on Waste;
[93] Amendment no 8 and 10 of the Parliaments 2nd Report; See also 12th recital of the Amended Proposal Preamble and article 2/1 f);

licences required. In other words, it would seem that this provision establishes only a kind of secondary liability of these persons, even if at sometime they have the actual control of the waste, since they will rather than the producer only be liable if they cannot identify the latter within a "reasonable period" of time.

5.4.2.2.2. The Carrier of Waste

The Parliament further suggested that the carrier of waste should also be liable under this Directive [94], but the Commission adopted this suggestion only partially. According to the Parliament's suggested amendment, if the producer consigned the waste to an approved carrier, who is subject to the Convention on Civil Liability for Damage Caused during Transport [95], this carrier would be liable for any damage or impairment to the environment occurring when the waste was under his control, up to the financial limits applicable under article 9 of the referred Convention [96]. In such a situation, the producer would only be liable for the amount that exceeded those applicable limits and would be substituted by the carrier in the amounts up to those limits. The Commission's proposed article [97] is somewhat less extensive, since it merely establishes that in the situations covered by the Convention referred to, the carrier shall be liable within the applicable limits. A literal interpretation of this article would seem to be that it envisages the carrier's liability as parallel to the producer's liability since they will be equally responsible [98]. In my view, however, this article should be interpreted taking into account the amendments suggested by Parliament .

[94] See Amendment no 1 and no 8 of the Parliaments 2nd Report;
[95] Convention on Civil Liability for Damage caused during the Carriage of Dangerous Goods by Road, Rail, and Inland Waterway vessels of 10/10/89;
[96] Amendment no 10 of the Parliaments 2nd Report and Explanatory Statement;
[97] See article 3 of the Amended Proposal;
[98] See Thieffry, pp. 968;

5.4.2.2.3. Public Authorities

The provision regarding the liability of the producer was amended by the Commission mainly due to the criticisms made of the term "occupational activities", and the suggestion of the Parliament that the industrial activities likely to produce dangerous waste [99] should also be explicitly included. The former concept was substituted by the notion of "commercial and industrial activities" [100], that only covers professional producers and the industrial activity of public or non-profit-making bodies [101]. In fact, the possible exclusion of public bodies from the scope of the Directive was one of the major concerns initially formulated by the Parliament, which considers that a public body responsible for collecting, dumping and/or managing waste, including household waste, should also be held liable [102]. Nevertheless, by referring to the concept of person "as any natural or legal person as defined by public or private law" it seems that the Commission reformulated its initial position to include public authorities or other public institutions, and the management of a disposal site by a public authority [103] within the scope of the draft Directive [104].

[99] Point 6 of the Explanatory Statement;
[100] It was only substituted in article 2º/1 a) and not in article 1 about the scope of the Directive;
[101] See Opinion of the ESC, pp. 4;
[102] See point 10 of the Explanatory Statement of Parliaments 1st Report, part B; see also Rüdiger Lummert, who confirms the distinction between the State taking part in businees life like a private individual and when it is merely exercising its sovereign functions;
[103] See paragraph 10 of the Explanatory Statement of the 2nd Parliaments Report ;
[104] See Sheelan, pp. 431, who citing an interview with Micheal Prieur, confirms the contrary idea that the directive's scope does not include public waste producers and handlers. This idea refers to to the traditional distinction in most European countries between private law and public administrative law. One should also mention the possibility of public waste producers, for example a certain public company, acting as a private company;

5.4.2.3. Lender liability

Furthermore, such a definition of producer and the interpretation of the concept of "actual control" have raised some doubts as to whether banks [105] and other commercial intermediaries can be held liable for the polluter company whom they have financially supported, either through loans or leasings. In other words, banks fear that they will be made liable for the clean-up costs if they are considered to have practised some form of ownership or control over a borrower's activities [106].

On the other hand, by establishing a system of strict liability together with a rule of joint and several liability, the proposed Directive may be considered to give preference to the so-called "deep-pocket" approach. According to this theory such a system would result in the plaintiff's suing the defendant with the best financial capacity to pay for any compensation or restoration costs. Since the "richest" does not always correspond to the "principal polluter", such a system distorts an effective application of the "polluter pays" principle.

Instead of the Directive's "actual control" concept, the Green Paper suggests that in order to achieve the intended usefulness of any strict liability system, such liability should be channelled to the "party having the expertise, resources, and operational control to carry out the most effective risk management" [107]. This may well mean that banks can be held as liable parties if it is considered that at some stage they had sufficient control over the borrower's activities to be able to assess and prevent any possible environmental damage.

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[105] Christopheer Van der Hauwaert, *"Clean Take-overs in the European Single Market"*, in European Business Law Review, November 1991, pp. 268 in which the possibility of lender liability of banks, when e.g. it is foreclosing a mortgage on polluted land, is referred to;
[106] See Chapter 4; see also Christophe Nitsche and Chris Hope, "*Bank as Policeman - money lundering and the proposed European environmental legislation*", University of Cambridge, Research Papers in Management Studies, October 1993;
[107] See point 2.1.3 of the Green Paper;

Unlike CERCLA, neither the draft Directive nor the Green Paper provide for a secured lender exemption and thereby leave the former question unsolved. This idea of banks as "innocent purchasers" [108] being held liable for damage caused by waste considered to be under their control, has seriously frightened the environmental business market, in particular the financial investment market. In any future Directive on Environmental Damage, the interests of both sides of the market will have to be weighted in order to define the "extent to which liability travels horizontally" so as to include or not these financial parties, who have a less direct relation with the polluting activity [109].

5.4.2.4. Information Right

Unlike the Council of Europe Convention, the draft Directive does not provide for any specific right of access to environmental information. However, the Community has already adopted a specific Directive on the freedom of Access to Information on the Environment, which enables any natural and legal person to obtain from any public authority information relating to the state of the environment [110].

Furthermore, the Community has recently established the European Environmental Agency whose role is "to supply Member States with objective, reliable and comparable information at the European level, enabling them to take the necessary measures and to ensure that the public is properly informed about the state of the environment" [111].

[108] See Van der Hauwaert, "if such innocence is possible!";
[109] See Wilkinson, pp. 160;
[110] See Council Directive 90/313/EEC of 7/6/90, L 158/56;
[111] See EEC Regulation nº 1210/90 of 7/5/90;

5.4.3. Standing

As to which parties should have standing under this environmental liability system, two major groups may be distinguished during the Directive's discussion process. On the one hand, the private parties or their heirs who may bring a legal action when a defendant's act has caused them personal or property damage. On the other hand, the public authorities and common-interest groups, the latter having been referred to as those "special-interest groups or established and recognised associations whose corporate aim is to protect the environment and public health" [112], are also given standing under the draft Directive.

5.4.3.1. Public authorities

Although in the first draft, the Directive vested the public authorities with the right to bring actions for injury to the environment [113], in the amended proposal their standing was left to the Member States internal law.

5.4.3.2. Environmental associations

Several comments were made concerning the standing of environmental organisations - such as common-interest groups - by the Parliament, in the Greenpeace Recommendation suggesting that the standing of such groups should be harmonised at Community level, and by the European Federation of Waste Management according to which the standing of these groups should not even be admitted, in order to avoid legitimating an unlimited number of potential plaintiffs [114].

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[112] Point 7 of the Explanatory Memorandum;
[113] Article 4º/ 3 and 4 of the Original Proposal;
[114] FEAD Statement on the Draft Directive of the Commission of the European Communities concerning civil liability for damage caused by waste, of 2/5/90 as cited by Feeley, supra note , pp. 268, note 179;

At first glance there seems to be no major difference between the two versions of the draft Directive concerning the standing of common-interest groups, but the final version of the proposal seems to limit the Member States' initial discretion in determining whether environmental organisations should have the right to bring a legal action for injury to the environment. In other words, initially the Commission partially accepted the Parliament's suggestion that those groups which have as their object the protection of nature and of the environment, shall be uniformly granted standing. Afterwards, the initial restriction that left it to the Member States' law to determine which of these groups should be considered for standing purposes was substituted by a restriction according to which only the conditions under which such groups may bring legal actions were to be left to national legislation. The Commission and the Parliament have thereby somewhat weakened the formal limitation on the Member States' discretion and until practical implementation by the Member States begins, it will be difficult to decide whether this change is relevant or not.

Nevertheless, a stronger intention of harmonisation in the final version should be acknowledged, probably the result of a compromise between the different reactions referred to above [115]. Furthermore, in the Green Paper the Commission diplomatically avoided this issue by not referring to any possible solutions for any future Community law instrument.

Again, the problems that arise in the situations where public waste producers or disposers are responsible for the damage suffered are left unsolved, since it remains unclear whether common-interest groups will have the right to sue public authorities for impairment caused to the environment or not. Such problems derive from basic questions about those situations of impairment to the environment where the damage

[115] See point 7 of the Explanatory Memorandum in which the Commission explicitly states that it was not its intention to harmonise the standing rules but only to establish an intermediate solution ;

occurs in property that is not privately owned. Who is considered to have a legal interest in suing for damages inflicted on such "public goods" [116]?

Traditionally, most civil liability theories have considered that only the State had a right to bring an action for the compensation of a publicly owned good and only recently have these accepted that certain representative groups may have as their object the protection of the environment and should therefore be given standing to effectively fulfil their function in society. Leaving such a discussion for a later moment, the following premise is appealing: the environment, no matter how it is defined, belongs to all of us and we should be able to defend it independently of any public initiative.

5.4.4. Remedies

Article 4 of the Original Proposal, by enabling the various potential plaintiffs to take legal action to obtain either the prohibition of the polluting act, and/or the reimbursement of expenditure to restore the environment and to prevent and compensate the damage, went far beyond the traditional relief of the victim's losses [117], providing for both tort and cleanup actions.

Later on, in a compromise with the Parliament's recommended modifications, the Commission amended this article, by clarifying and unifying the remedies that shall

[116] In relation to the review of Community measures under article 173º/2 of the EEC Treaty see Eckard Rehbinder and Richard Stewart, "*Environmental Protection Policy*", vol. 2, Chapter VI, Part B, who refer to the ECJ opinion that a third private party is accorded standing only where the relevant decision is of "direct and individual convern" to that party. Accordingly, they consider that associations do not have standing since by their nature they can not be affected by decisions concerning one of their members and the latter's interests can not be aggregated;

[117] Patrick Thieffry, *"Les nouveaux instruments juridiques de la politique communitaire de l'environnement"*, in Revue de Droit Europeen, Paris, Ann. 28, nº 4, Oct-Dez 1992, pp. 669-685;

be made available to every kind of plaintiff. Nevertheless, it diminished the initial impetus which differentiated the Directive system from the classical systems of civil liability, by leaving it for the Member States to determine which plaintiffs may bring a legal action for environmental damage and what remedies are available to them.

5.4.4.1. Evolution

At least in theory, the remedies initially available differed according to which party instituted the legal proceedings [118]. Returning to the distinction made concerning the parties with standing, it seems that both the private parties, in relation to the personal or property damage they suffered, and the public authorities and common-interest groups, in relation to injury to the environment [119], could sue to put an end to the activity causing the environmental harm [120]. Nowadays, an injunction may be obtained to prohibit an act that has caused or that may cause damage or impairment to the environment, and the compensation for damage *stricto sensu* is also possible [121].

Furthermore, an injunction ordering the reinstatement of the environment and/or the execution of preventive measures was generalised to every person that could bring a legal action. On the other hand, the reimbursement of expenses made to prevent the damage or injury to the environment and/or to reinstate the environment was one of possible remedies that remained unchanged [122].

According to the last version of the draft Directive and the amendment of the provision in issue, in principle all the parties referred to still have the right to institute

[118] See Feeley, *supra* note , pp. 263;
[119] Damage and injury to the environment as defined in article 2º/1 c) and d) of the Original Proposal;
[120] Using this concept to embrace the damage and injury to the environment as defined by the proposed Directive;
[121] See article 4º/1 b), subparagraph (i) and (ii) of the Amended Proposal;
[122] Article 4º/1 b), subparagraph (iii) of the Amended Proposal;

legal proceedings for the above-mentioned referred causes of action. In other words, the major difference now is that it is up to the Member States internal law to determine the persons who may bring a legal action and the remedies available to them, although the national laws are obliged to provide for the same remedies referred to above [123].

Nevertheless, even if the Member States national law does not restrict the remedies that should made available, it may happen that its civil procedure law establishes a prerequisite for claiming those remedies, according to which the plaintiff must have personally suffered the damage or must have a direct and lawful interest in bringing such legal actions. Therefore, it is not completely clear whether each Member State may restrict certain remedies to only certain types of plaintiff.

5.4.4.2. Private parties

The third and the fifth cause of action seemed to be exclusively directed towards private parties, by enabling them to seek the reimbursement of expenses made to compensate for property damage [124] and the indemnification of personal damage respectively. Although the final version of the draft Directive still considers the possibility of obtaining compensation for damage *stricto sensu* it is open to discussion whether private parties should or should not have the right to sue for personal damages.

Finally, according to certain authors, the last modifications may even be considered as a unique approximation to certain elements of the American concept of

[123] Article 4º/1 b) of the Amended Proposal;
[124] See Freeman, pp. 18, and Sheehan, pp. 434; The first considers that article 4º/1 c) only covers property damage and therefore subparagraph 1 e) would logically refer to personal damage, but the last author by ignoring the express reference made to article 2º/1 c) (ii) does not make such a distinction;

"private attorney general" [125]. In other words, under the American system of environmental liability, the polluter's responsibility is under constant threat of being heavily penalised due to legal actions brought by private individuals, which threat constitutes an important incentive for the compliance of the potential polluters with environmental regulations.

In fact, the Directive does not seem to forbid a private individual from taking a legal action against an impairment to the environment different from the damage he suffered, and even if he has not suffered any specific damage he may claim the reinstatement of the impaired environment. In other words, it may be possible for a private party to seek compensation for impairment to the environment, even though he has not personally suffered any damage .

5.4.4.3. Public authorities and Common-interest Groups

Initially, public authorities could only take legal action to obtain an injunction ordering the cessation of the activity causing the environmental damage and/or to obtain the reimbursement of the costs of preventive measures that it had taken. Furthermore, they could also bring cleanup actions forcing the defendants to restore the environment to its state prior to the injury and if they had incurred expenses during the cleanup, they could ask for reimbursement [126] . In the final version, this specific reference to public authorities was deleted and its standing will also be decided by each Member State's internal law.

On the other hand, common-interest groups were only allowed to take a legal action to obtain "the prohibition or cessation of the act causing" the environmental damage, as long as the Member States internal law gave them standing for such

[125] See Thieffry, pp. 972;
[126] Article 4º/ 1 a),b) and d) by reference of article 3º of the Original Proposal;

actions. Although they were also allowed to seek the reimbursement of expenses incurred in restoring the environment, they could not obtain an order for the defendants to restore the environment themselves [127].

According to the final amendments, common-interest organisations having as their social object the protection of the environment, have the right to seek any of the remedies provided for by the Directive or to join in any of the legal proceedings that have already been brought before the Court. However, the conditions under which these parties may bring a legal action shall be established by national law.

Although this last amendment took into account the Parliament's suggestion, the Commission did not adopt the part of that suggestion which allowed Member States to limit, at a national, regional or local level, which groups were authorised to bring about such actions. Member States no longer have the power to decide if these groups have the right to seek such remedies but they may determine the conditions under which this right shall be exercised.

5.4.4.4. Limitations of Liability

The Commission maintained certain limitations to the reinstatement of the environment, following the same position when it initially recognised that such an action could "involve costs out of all proportion to the desired result" [128] but these limitations do not apply to damage *stricto sensu*.

According to the proposed limitations, the plaintiff may not seek the above-mentioned reinstatement or reimbursement, if the costs for such actions "substantially exceed" its consequent benefits to the environment and if other "reinstative" measures may be "undertaken at a substantially lower cost" [129]. In other words, this

[127] Article 4º/4 of the Original Proposal;
[128] Point 6 of the Explanatory Memorandum;
[129] Article 4º/2 of the Original and Amended Proposal ;

"cost-benefit" [130] liability limitation obliges the plaintiff to accept cheaper reinstating measures, even if suggested by the defendants, as long as they adequately reinstate the environment or reimburse the expenditure incurred to this end. The plaintiff may, however, always force the defendant to take such alternative measures or demand the reimbursement of expenses he incurred to implement the measures himself.

A question remains as towhether such cost-benefit analysis absolutely precludes the adoption of more costly measures when the suggested alternative measures do not adequately achieve the desired results or are not "substantially" less costly. For example, if the alternative measures suggested by the defendant or by the judge himself are not substantially less costly, may the plaintiff implement his proposed reinstating measures even if its costs exceed its consequent benefits [131]?

Apart from these cost-benefit limitations no further financial ceilings were adopted, since the Commission not only considered them unjustified to achieve the aims of the proposed liability system but even contrary to the Treaty's polluter pay and precautionary principle [132]; contrary in the sense that the application of these principles may be distorted since those restoration costs that exceed the established limits will probably be paid by society in general, or in other words by the taxpayer. On the other hand, if polluters know in advance that they will not have to pay more than a certain amount for environmental damages, they may take fewer measures to prevent this "out-of-bounds" damage [133]. If any limits on liability are to be accepted, they should be set at such a high level that theyu do not negate the usefulness of the proposed strict liability system.

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[130] See Freeman, pp. 21 for a comparison with the CERCLA's cost-effectiveness approach;
[131] See Sheehan, pp. 435;
[132] See point 8 b) of the Explanatory Memorandum;
[133] See 2.1.6 of the Green Paper;

The Parliament's, on the other hand, was of the opinion that unlimited strict liability would render insurance under this Directive difficult, if not impossible [134]. Therefore it suggested that when the defendant was not at fault, although remaining subject to strict liability, he should be able to profit from previously established limitations on the amount of damages that may be awarded [135]. Although these limits were not accepted by the Commission in the proposed Directive but they were nevertheless considered necessary in the Green Paper.

In fact, the Green Paper further suggested that when the polluter was not at fault, but unforeseeable damage had still occurred, for which he was not insured and could not have taken any preventive measures, he should only be held liable up to certain limits. It further stressed that the aim of any liability system should be to prevent any future environmental damage and to compensate for restoration costs and not to indiscriminately punish all potential polluters [136].

5.4.4.5. Compensation for economic or other non-material damage

Finally, the questions of whether and to what extent damage for loss of profit, economic loss or other non-material damage should be recoverable was left to the Member States national law [137]. Among the questions this raises is whether this reference to damages should be interpreted as including both damage in *stricto sensu* and the impairment to the environment or not. Considering that each time a certain provision applies to both types of environmental damage, the draft Directive usually states so specifically, probably this compensation for loss of profit applies only to damage *stricto sensu.*

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[134] See point 17 of Explanatory Statement of the Parliaments 1st Report;
[135] See article 11º/2, 3, and 4 of the amendment nº 18 of the Parliaments 2nd Report;
[136] See point 2.1.6. of the Green Paper;
[137] See article 4º/1 d) and 4 of the Amended Proposal;

Doubts will probably arise as to whether it will be possible to demand compensation for such damage in the same legal action brought under the implementing measures of a future Directive. In other words, if the national law of a Member State allows for the compensation of such damages, will the plaintiff have to bring a completely separate legal action or will it be possible for him to present his demand in the proceedings brought under the Directives' implementing provisions? In the first situation, the action will have to be brought according to the conditions established by the Member States' internal rules, even if for example, it establishes a system of fault liability. In the second, the conditions to be fulfilled are those established by the Directive, according to its strict liability system.

5.4.4.6. Punitive Damages

Although the Directive has increased the number of remedies available to the plaintiff, it does not provide for punitive damages, since its aim is more preventive than repressive. As an American author enviously states, this proposed Directive, unlike CERCLA, "is not vindictive and contains no reflexive moral condemnation of polluters".

5.4.5. Burden of Proof

5.4.5.1. From the "Overwhelming Probability" to the Standard of Proof Test

One of the most criticised articles of the Original Proposal was that which established the causation requirements to be fulfilled under this strict liability system [138]. Although a strict liability system usually facilitates the plaintiffs traditional burden

[138] See chapter on a comparison of the different civil liability systems

of proof, he still has to establish the causal connection between the environmental damage and the defendant's act [139].

Accordingly, under the original proposal the plaintiff still had to prove the existence of the damage and to establish that the producer's waste had, by an "overwhelming probability" [140], caused such damage or injury to the environment [141]. This provision was later amended by the Commission, which had already explained that the English text had unintentionally included the term of "overwhelming probability" instead of "balance of probabilities" [142]. The Commission also accepted the Parliament's suggestions [143] that such a "burden of proof shall be no higher than the standard burden of proof in civil law".

According to this amendment, the plaintiff still has to prove the causal link between the defendant's waste and the damage or impairment to the environment, suffered or likely to be suffered, thereby clearly adopting preventive action clauses. Although the draft Directive leaves it to the Member States' internal law to determine this burden of proof, it does not provide that it shall be no higher than the standard one in civil law [144], which concept seems to leave too wide a margin of discretion.

5.4.5.2. Joint and Several Liability

The Commission did, however, ease this burden of proof on the plaintiff by establishing that when the same damage or impairment to the environment has been caused by more than one person [145], all the responsible parties will be held jointly and

[139] See point 2.1.2. of the Green Paper
[140] Such a concept would lead to different interpretations by each national court which would probably transform it into a more stringent causation requirement;
[141] Article 4º/6 of the Original Proposal;
[142] See Feeley ,supra note, pp. 264 and also point 3.2 of the ESC Opinion;
[143] Article 4º/1 c) of the Parliaments 2nd Report;
[144] See article 4º/1 c) of the Amended Proposal;
[145] In the Original Proposal, the provision referred only to the producer;

severally liable. In other words, the plaintiff will only have to establish the causal link between the injury suffered and one of the wastes that caused it, and the producer of such waste will be held liable for the total amount of the damage. Even if this person is only responsible for part of the damage, he will be held liable for the full amount of the damage but will be able to seek redress under the applicable Member States law.

This provision for joint and several liability raised several criticisms, for example that it would stimulate the "deep pocket syndrome" [146] or that it would endanger the insurability of the proposed liability system. According to the first criticism, the plaintiff would probably sue the producer with the best financial capacity to satisfy any compensation that may be granted, even though these persons may be responsible for only some small part of the environmental damage, thereby distorting the "polluter pays" principle.

The Green Paper also recognises the usefulness of the joint and several liability rule, especially in cases of chronic pollution where environmental damage is caused by the cumulative effects of different polluting activities. In such situations, not only can it be very difficult to link each individual activity to a specific amount of damage but such damage may not be divisible at all [147]. The Paper goes on to consider that these difficulties may be efficiently dealt with by a joint and several liability rule in the manner referred to above whereby the transaction costs would be accordingly reduced.

Nevertheless, the disadvantages of a joint and several liability rule must also be acknowledged; it will probably increase the amount of subsequent contribution actions

[146] See Geoffrey Thompson, "*Environmental liability in Canada: the risks for lenders, receivers and trustees*" in Environmental Liability, Chapter IV, Part A, who considers that under the deep pocket syndrome, financially viable entities can end up paying for for the share of clean-up costs that should have been borne by others who are now unable to pay or who cannot be located; See Ian Doolittle, *"Environmental Liability"* in International Financial Law Review, June 1992, Supplementum, pp. 21;
[147] See point 2.1.5. i) of the Green Paper;

with which the courts will have to deal and again increase the respective transaction costs. The Green Paper suggested that such transaction costs could be diminished by previously establishing the "order in which potentially liable parties should be sued"; the proposed Directive does this to some extent by establishing a primary liability on the producer of the waste, followed by a secondary attribution of liability to persons defined in article 2º/2 . The channelling of liability is also referred to as a mean of reducing those transaction costs, but if the defendant is still given the right to seek redress from the other responsible parties than this instrument will not reduce contribution actions.

5.4.6. Defences

The Commission initially proposed [148] as possible defences *force majeure*, as defined by Community Law [149], and contributory negligence, when the damage was also caused by the faulty or negligent conduct of the injured party or another person under his responsibility [150]. It later accepted the Parliament's proposals of defences due to the intentional acts of third parties or for the exclusion of liability of the eliminator of waste due to the producer's misstatements regarding the nature of the waste. For some authors this enlargement of the possible defences seem to be a partial return to the traditional system of fault liability.

[148] See article 6 and 7 of the Original Proposal;
[149] See Opinion of the ESC, point 3.3 and Parliament 2nd Report which criticise the "force majeure" definition given by the Court of Justice judgement of 5/2/87 on the case nº 145/85, *Denkavit België v. The Belgian State*, ECR 1987-2. The ECJ defined the concept "in the sense of unusual and unforeseeable circunstamces, beyond the traders control, the consequences of which could have not been avoided even if all due care had been exercised";
[150] Article 7, 2nd paragraph of the Commissions proposals;

Unlike the Products Liability Directive [151], no defence regarding the development risks was even discussed during the preparatory works for this Directive. Although the idea for such a defence, which would take into account the state of scientific and technical knowledge at the time the incident occurred, was supported by the industry-oriented side of the "discussion table", it never received any serious consideration in the discussions at Community level on environmental liability .

In the Council of Europe Convention, on the other hand, this idea was subject to a specific reservation, according to which the Contracting Parties may include in their internal legislation an additional ground for exemption concerning development risks [152].

5.4.6.1. Force Majeure

According to the concept of *force majeure* as a ground for exemption, if the defendant proves that the damage or impairment to the environment resulted not from his faulty conduct but from a case of *force majeure*, as defined in Community law, he will not be held liable. Since the concept of *force majeure*, regarding the civil liability of private individuals, is not referred to or defined in any Community legal instrument it was necessary to use a definition given by the ECJ [153].

In fact, according to certain cases of the ECJ, concerned with matters of common agricultural policy, force majeure is defined as those "unusual and unforeseeable circumstances, beyond the traders control, the consequences of which could have not been avoided even if all due care had been exercised"[154]. Nevertheless, the Parliament considered this definition of *force majeure* given by the ECJ unsuitable for

[151] Council Directive 85/374 of 25/11/85;
[152] See article 35º/1 b) of the Council of Europe Convention;
[153] See Case C-338/89, *Danske Slagterier* of 7/5/91, pp. T-2315;
[154] See ECJ Case nº 145/85, *Denkavit België v. The Belgian State* of 5/2/87, ECR 1987-2;

the field of civil liability and thereby suggested the adoption of the classic definition in International Law [155]; this suggestion was not accepted by the Commission in its amended proposal and since it took into account the recent definition given in the Council of Europe Convention it is therefore subject to the same criticism that it gives an exhaustive list of cases of "force majeure".

In the end, the reference to "force majeure as defined in Community law" was maintained and therefore the future and past jurisprudence of the European Court of Justice will be of great importance in interpreting this concept.

5.4.6.2. Fault of the Injured Party

Initially, it seemed as if the producers' liability would only be disallowed or reduced in the cases of contributory negligence of the injured party [156], an incoherence that was noted by the Parliament [157] and accordingly amended by the Commission [158]. In fact, under most systems of civil liability the concept of fault of the injured party is wider than contributory negligence since the former also includes the victim's intentional wrongful conduct.

Nevertheless, the concept of faulty conduct of the victim is still not referred to in the amended provision, leaving a room for doubt as to whether a kind of strict liability of the injured party was hereby created. In other words, it seems that if the producer can prove that the injured party, or any person under the injured party's responsibility, contributed wholly or partly to the damage or injury to the environment, his own

[155] See amendment nº 13 of the Parliaments 2nd Report, which excludes any person from liability if he proves that any damage "resulted from any act of war, hostilities, insurrection or a natural phenomena of an exceptional, inevitable and irresistible character", and also the commentary to article 6 on part IV of its Explanatory Memorandum of the 1st Report;
[156] See 14th recital of the Original's Proposal Preamble;
[157] See Amendment nº 2 of Parliaments 2nd Report ;
[158] See 16th recital of the Amended Proposal Preamble ;

liability will be accordingly waived, without his having to prove any fault in the victim's behaviour. Furthermore, it is also arguable whether this defence includes not only the injured party's faulty conduct in the production of the damage but also his failure to minimise such damage.

5.4.6.3. Contributory Acts of Third Parties

On the other hand, the Commission adopted the Parliament's amendments which suggested two new types of defences: one regarding the intentional intervention of a third party and another for the producer's misstatements regarding the nature of the waste [159].

The defence for an intentional intervention of a third party means that, if the producer can prove that not only it was not his fault but also that it was the intentional conduct of a third party that caused the damage [160], he shall be relieved of liability. Therefore, the rationale on which the former version of this article based itself was hereby abandoned [161]. In fact, this rationale was the same as the parallel provision in the Directive 85/374 on Defective Products, according to which the producer could always proceed against third parties through the national rights of recourse.

The second defence refers to the possibility of the eliminator of waste avoiding liability if he can prove that the producer, when consigning the polluting waste, wrongfully informed him of the nature of that waste . In this case, as in all the other defences, the person seeking to exclude himself from liability will have to prove that there was no fault, including negligence, careless or ignorance, on his part.

5.4.6.4. Authorisation by Public Authorities

[159] Article 7º of the Amended Proposal;
[160] Article 6º/1 a) of the Amended Proposal;
[161] See point 8/c 3) of the Explanatory Memorandum;

Furthermore, the proposed Directive explicitly establishes that the existence of a permit issued by a public authority does not limit or exclude civil liability for damage and injury to the environment [162]. According to several authors, such an exclusion of a permit from the possible defences follows the trend in most Member States where the mere holding of official authorisations does not discharge the producer of waste from his environmental liability [163].

Usually, the purpose of any environmental permit is not only to enable the government to control the polluting activities below an acceptable level but also to regulate the unavoidable use of the environment by the economic operators. Nevertheless, since acceptable levels are difficult to establish and are also subject to constant change, even if the activity causing it has been previously authorised [164], damage to the environment may still occur.

In the Green Paper, the Commission seems to have reconsidered the position taken in the proposed Directive, by distinguishing between environmental damage which results from the polluter's non-compliance with the conditions set by the relevant permit, and/or the non-existence of the permit from the situations where the environmental damage results from activities which fully comply with conditions set in the public authorisation.

On the one hand, the Green Paper - like the proposed Directive - suggests that the polluter shall be liable for any damage he causes when he exceeds the quantity and quality limits established in the authorisation under which he operates. On the other hand, it asks why, if the polluter has fully complied with all the requirements set in the permit, he should still be considered liable for the whole amount of the damage. The rationale behind this is that an economic operator should not be unjustly

[162] Article 6º/2 of both the Original and Amended Proposal;
[163] For the French Law, see Prieur, *"Droit de l'Environnement"*, 2ª edit., nº 940;
[164] See point 2.1.5. ii) of the Green Paper;

penalised for relying on the authorisation given by the competent public authorities. By way of example, if any European citizen, either individual or corporate, is given a legal permit which authorises him e.g. to discharge his waste waters into a river, he should not be held solely liable for the damage occurring from discharges within the established limits.

The Community's acknowledgment that public authorities should also be held responsible for their decisions and activities that unduly impair the environment, it may be too radical [165]. In fact, the Green Paper expressly suggests that public authorities which have granted a "pollution" authorisation should be held liable for the damage caused by the authorised activities, as long as these fully comply with the standards set. This principle is based on the assumption that these regulatory bodies are given the competence but also the duty to evaluate the quantity and quality of polluting activities that may be accepted in the specific environment for which they are responsible.

Although public authorities should be held responsible for their, sometimes "irresponsible", decisions, their liability should not be strict or at least should be joint and several with the polluters themselves. Since the public authority is not a polluter, to subject it to strict liability would not only distort the "polluter pays" principle but also create a "polluted pays" principle because any public costs would be passed on to the taxpayers. According to such joint and several liability suggestion, although the polluters would have been duly authorised they would be expected to operate in good

[165] For a general view on the responsibility of the administrative authorities see J.Ph. Colson, *"Police des déchets et responsabilité administrative"*, J.C.P. 1991, ed. E, supplément au nº 27, in Cahiers de Droit de l'Enterprise, nº 4, pp. 2;

faith and within the legal limits [166] and if not they should be considered to have contributed to the damage.

5.4.6.5. Contractual derogation

Originally, the proposed Directive established that the producers' liability could not be limited or excluded in relation to the injured person, but this reference to the victim was later deleted [167]. In its present state the provision establishes that no person, considered liable under this Directive may contractually limit or exclude such liability.

Nevertheless, it is questionable whether certain contractual clauses, limiting or excluding liability, are possible among professionals, if they do not limit third parties rights; for example, the limitative clauses celebrated between the buyers of a specific industrial real estate and the owners of the selling company, according to which the costs of any potential damage caused by waste accumulated by the past owners shall be equally apportioned.

Furthermore, it should also be possible for the producer to obtain contractual indemnities from those to whom he committed the waste [168]. In other words, the producer can contract with the carrier or with any other person to whom he legally transferred the waste, that if damage or injury to the environment caused by the transferred waste occurs, as a result of the latter actions, they will be responsible towards him for any related indemnification costs [169]. These contractual arrangements do not exclude the producer's or any person's liability under the draft

[166] If the Government authorises you to destroy a unique natural resource not only you have the moral obligation not to do it, but there will surely exist prevailing laws that forbid such actions;
[167] Compare article 8º of the Original and of the Amended Proposal;
[168] See Bryce, 1991;
[169] See point 5 of the Explanatory Memorandum;

Directive, which is not negotiable, but oblige the carrier or any other responsible person to compensate the producer for any liability he incurs because of them.

5.4.7. Limitation periods

5.4.7.1. Expiration period

Initially, the expiration period of three years was to be counted from the moment the plaintiff knew of or should have known of the damage or injury to the environment and of the producer's identity [170], but reference to the identity of the producer was withdrawn in the amendments adopted by the Commission. Furthermore, originally this period of three years applied only to the plaintiff's taking legal action to obtain an injunction [171], but this limitation was also amended and this expiration period now applies to all legal actions that can be brought [172].

Besides this a general expiration period was established, according to which no actions shall be brought after a period of thirty years from the moment the incident giving rise to environmental damage or impairment occurred. Although the Parliament was of the opinion that such expiration period was too long, it has remained unchanged. The rationale for this was that although any right to compensation for damages should be disallowed after a certain period, the definition of this period should take into account those types of pollution whose effects are not immediately visible, for example the disposal of waste in permanent deposit sites.

The term "incident" must be defined in order to decide from when the expiration period of thirty years is to be be counted. Although in relation to the transitional period of the draft Directive it was partially clarified that it shall not apply to the incidents

[170] See article 9º/1 of the Original Proposal;
[171] See article 9º/1 which refers to article 4º/1 a) of the Original Proposal ;
[172] See article 9º/1 and article 4º/1 of the Amended Proposal;

occurring before its entry into force, any future Directive should follow the Council of Europe Convention and clearly exemplify the different meanings of the term incident.

5.4.7.2. Retroactive application

5.4.7.2.1. In the proposed Directive

In fact, it is very important to clarify the above mentioned doubts regarding the moment when the "incident" occurred [173]. Should this reference be interpreted as the moment when the polluting activity occurred or the moment when the damaging effects of the polluting acts were felt, which in certain situations of waste disposal usually occur several years later ? For example, the permanent disposal of waste may in the future have cumulative effects resulting in environmental degradation.

The interpretation of the term "incident" is important for the possibility of retroactive liability, contrary to the economic principle of predictability, according to which any economic operator has the right to know the legal consequences that his acts may possibly have [174]. For example, if the concept of incident includes the continuous effects of a polluting waste disposal, past waste producers would be retroactively subject to this new liability system [175]. Although such an interpretation is contrary to the Commission's stated purpose of limiting the Directive's scope to prospective application [176], its implementation into internal law or the interpretation made by national courts may create some problems.

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[173] Article 13 of the Original Proposal;
[174] Freeman, George Clemon Jr and McSlarrow, Kyle, *"The Proposed European Community Directive on Civil Liability for Waste - The Implications for US. Superfund reauthorization in 1991"*, 46 Business Lawyer, 1990-1991, I, pp. 8;
[175] See Freeman, who considers that if incident is interpreted to include not just the original disposal of waste, but continuing pollution as well, then arguably any current pollution could subject past generators to new liability , even if the wastes were in someone else's possession after the date of the Directive's enactment;
[176] Point 8 of the Explanatory Memorandum;

In the meantime, some part of the doctrine tends to accept the interpretation that the Directive does not apply to damages to the environment resulting from polluting acts which occurred before the implementing national measures came into force [177]. The Green Paper is also very clear in specifying that the instrument of civil liability should not be used to repair for environmental damages inherited from the past.

5.4.8. Insurance

Environmental risk insurance is a recent service, and the lack of statistics and precise information on environmental risks has led insurers to go back on their initial impetus. In fact, several problems may be encountered by the insurer when providing coverage for environmental damage, namely the definition of such damage, its predictability and its probable extent.

These problems make it almost impossible to determine the insurability of such damage, which, when obtained, is thus usually far from perfect. In the meantime, the policy of the insurance market has varied from imposing ceilings on the amount of damages to be covered, to limiting such coverage to certain types of environmental damage and/or raising the insurance premiums.

5.4.8.1. Evolution in Community Law

In the Directive on Waste Shipment [178], which partially stimulated this proposal, and in the 4th Environment Action Programme the Council advocated the implementation of a system of compulsory insurance. However, in the initial Directive

[177] See Patrick Thieffry, *"La responsabilité civile du pollueur: les projets communautaires et la convention du Conseil de l'Europe"*, in Gazette du Palais, 5/8/93, pp.966;
[178] Directive nº 84/631 on Waste Shipment;

the Commission did not consider it appropriate to regulate insurance, particularly at a time when the insurance sector was backing out of the field of environmental damage [179].

5.4.8.2. The Final Proposal

The Parliament's suggestions were, however, partially accepted, obliging the producer and the eliminator of waste to be covered by an adequate financial scheme, either by insurance or some other financial security [180]. This reference to "any other financial security" was introduced to cover those situations of self-insurance, which are being increasingly adopted in order to compensate for the recent lack of insurance coverage. Besides these situations of self insurance, financial security can be given by the State, which, excluded from the scope of mandatory insurance can self-insure for waste products or producers through a Bank guarantee or by a compensation fund.

The Directive also required the producer to include the name of his insurers in his annual report, probably to make such information available to any potential claimant to a compensation for damages [181]. This requirement is considered by some as inadequate because not all the producers are obliged to present an annual report and the mere reference to the insurers name is insufficient, since it does not clarify more specific information regarding the type and amount of insurance coverage [182].

5.4.8.3. Limits on Liability

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[179] See point 9 of the Explanatory Memorandum;
[180] See article 11º/1 of the Amended Proposal;
[181] See article 3º/2 of the Amended Proposal;
[182] See Patrice Level, *"Proposition de Directive CEE du Conseil concernant la Responsabilité Civile pour les Dommages Causés par les Déchets"* in Revue des Affaires Européenes, Paris, nº 4, 1991, pp. 47;

The Parliament's suggestion was somewhat misinterpreted since originally it also provided for specific limits on liability [183] which were not adopted. Taking into account the difficulties in insuring environmental damage and the unnecessary unlimited liability when the polluter acted without fault, the Parliament had suggested a limitation scheme according to which the different types of damages to be awarded were to be limited in amount [184].

5.4.8.4. The Green Paper

Further on, the Green Paper extensively described the evolution and shortcoming of mandatory insurance for environmental damage. In broad terms, the main pitfalls that compulsory insurance as a compensation instrument may encounter are that coverage for such complex risks, such as those from which environmental damage usually arises, can be prohibitively expensive and/or its availability limited to a certain roof or completely non-existent.

The Green Paper's major concern, to be considered in any future Community law on Environmental Liability in general, is that if insurance is to be made compulsory it should be available in the market, under exactly the same conditions for which it is required. In fact a system of compulsory insurance not only implies that all the environmental risks should be covered but it may also create discrepancies between differently sized firms.

5.4.8.5. Insurers as Licensers of the Industry

Furthermore, if an obligation for mandatory insurance is accepted, this may well transform insurers into environmental "policemen" since they will feel compelled to

[183] Amendment nº 18 of the Parliaments 2nd Report;
[184] See paragraph 17 of the Explanatory Statement in the Parliaments 2nd Report and above paragraph on limitations on liability;

evaluate the industry's quality of risk management. The insurance market would exercise a "quasi-regulatory function" [185] but by choosing which potential polluters should be given insurance coverage, it would stimulate them to adopt better environmental protection measures. Nevertheless, this development would lead to a closing of the insurance market thereby undermining the efforts of smaller industries.

5.4.8.6. Future perspectives

The Directive as it stands in the present is too vague, allowing Member States to determine almost every detail of the proposed liability system. However, if the Directive were to impose mandatory insurance, the system specific conditions would have to be precisely established to avoid any potential distortions in its implementation.

The EEC is presently considering a three-tier system, according to which the State would cover a part of the environmental damage by establishing national funds or supporting smaller companies thereby complementing the activities pools formed by the different branches of activities. Besides these two initial restoration phases, an insurance scheme would be established to cover the remaining part of the damage [186].

5.4.9. Compensation fund

Although the Commission recognised the need to compensate the victim, particularly in those cases where it is difficult to establish liability, it considered that it was preferable to postpone the regulation of such situations . When referring to the situations where the persons responsible cannot be identified or where they are not

[185] See Wilkinson (1993), pp. 161
[186] See Anne Surzur, pp. 18;

capable of providing full compensation for the environmental damage they caused, the proposal considers that the possibility of these cases being solved by the establishment of a European Compensation Fund should be taken into consideration [187] and duly discussed.

These considerations are linked with the intrinsic limitations of any civil liability system, which in certain cases is not capable of providing the desired restoration of the environment or the compensation of the costs thereby incurred. The difficulties encountered are mainly related to the type of environmental damage caused such a long time ago that it may prove impossible to identify the responsible party or to establish the causal connection with the polluting incident. For example, in cases such as the permanent disposal of hazardous waste or the long-term effects of acid rain, it may prove difficult for the plaintiff to discover an individualised responsible party and even if he does so it he may not able to link its specific acts with the incident which contributed to the global damage [188]. Furthermore, the situation where the liable party may in the meantime have become insolvent will also make it almost impossible for the plaintiff to be adequately compensated for the damage suffered.

All these situations could be adequately dealt with under a pre-established compensation scheme which would fund the restoration of the damaged environment or pay the required compensation costs. Usually such compensation funds are maintained by taxes or contributions imposed on the economic operators most closely connected with the environmental damage in question. The scheme would usually link the fund contributions to the potential that each economic operator has for causing pollution, since this would induce most potential polluters to avoid any damage in the first place and it would correctly implement the "polluter pays" principle . In fact, if this

[187] See paragraph 10 of the Explanatory Memorandum and article 11º/2 of the Amended Proposal
[188] See 2.1.5 iii) of the Green Paper

principle is respected, the allocation of potential liability costs among the several operators of a specific economic sector leads to an effective internalisation of these costs.

As the Green Paper correctly stressed, individual liability is extended into a more collective form of allocation of responsibility which is restated in a "principle of shared responsibility for the impact of multiple acts" [189]. Such collectivisation of environmental liability may be justified in several ways, for example the possibility that certain liability costs can be better supported by a group of potential polluters than by one of its individual members. Another reason for considering this system preferable to a civil liability system is its financial ability to compensate or restore any environmental damage in a more speedy and less costly way. Nevertheless, several questions have been left open regarding the structure of such a system, for example whether the use of the funds to the restoration of the environment should be controlled and by whom.

5.4.10. Conclusion

The impact of the proposed Directive, if it is approved in its current status, is likely to lead the producer to a careful choice of the carriers and disposers of his waste, which will result in the waste disposal market being mainly reduced to the larger operators [190]. It is probable that, the smaller operators will not be able to resist the requirements of this civil liability regime , since either they will be potentially liable

[189] See point of the Green Paper;
[190] See Andrew Bryce, "Control of waste. existing rules and requirements and the proposed Directive on Civil Liability on Waste" in EC Environment and Planning Law, Chapter 9, who considers that the probable impact of this proposal will be a more careful selection of carriers and disposers by the producers, the increase in contractual arrangements likely to ensure that adequate indemnities exist for the producer one waste leaves his plant and finally the liability of waste-disposal companies will continue for a too lengthy limitation period;

for an unlimited amount of damages or the insurability of such damages will impose on them unreasonable costs [191].

However, considering the time this proposal is being taken to approve and the difficulties it is encountering, it is more than likely that this specific Directive will not be adopted but will be subsumed in a more radical and overall proposal for a Directive on Liability for Environmental Damage in General [192]. The Green Paper thus represents the current stage of the discussion regarding environmental liability in Europe, from which emerges the preference for a general regime instead of partial regulation of liability for environmental damage. Furthermore, it recognises the civil liability system as having an important enforcement function in the protection of the environment, while also showing several of its limitations which call for other forms of compensation.

Finally, it concludes that it would be desirable to combine the "strengths of a liability regime with the advantages of a compensation system" [193], proposing an integrated approach to a environmental liability system. Briefly, the Green Paper proposes a strict liability system supplemented by a complementary compensation fund. In other words, damages that could be related to the polluting acts of a specific polluter would be sued for under civil liability, and those damages for which payment is impossible would be compensated for by a pre-established compensation fund.

On the one hand, this integrated liability regime would seek compensation under civil liability laws only when the damage could be causally linked to a single party. On the other hand, several compensation funds, specific for each industry sector, would be set up in order to cover for all damages and thereby internalise all pollution costs

[191] See Wilkinson, pp. 130;
[192] See point I/1 of the Explanatory Statement of the "*Report on Preventing and Remedying Environmental Damage" from the Committee on the Environment, Public Health and Consumer Protection,* 8/4/94, Doc EN\RR\250\250373, A3 - 0232/94;
[193] See point 4.2. of the Green Paper;

[194]. Among the many problems that could be resolved with such a combination, one of the most important is that the need for retroactive application to duly compensate for past damage would be avoided.

[194] See among others, Rose, Julian, *"Civil Liability"*, in Environment Science and Technology, vol. 27, nº 5, 1993, pp. 784;

CHAPTER 6

INTERNATIONAL LAW

6.1. INTRODUCTION

It should not be forgotten that, despite the importance of the Community liability law instruments that have been analysed, that several European countries are not subject to Community regulation. For example, as a source of potential transfrontier pollution, Central and Eastern Europe may develop dangerously in the years to come and the effects of such development on the European environment should not be ignored [1] . In fact, due to their political and economical transformation, these countries may unfortunately be less demanding in relation to the installation and functioning of the traditional polluting industries [2]. Because this cause or may threaten to cause damage in another country, to achieve an efficient protection of the environment any future legal instrument should apply to the largest number of States possible.

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[1] See "*Environmental Liabilities - Dirty Legacy*" in The Economist, September 18th-24th 1993, pp. 92 which refer to the tendency of the former communist countries to spend their limited resources on cleaning up old sites to facilitate future selling instead of using the money to prevent new pollution;

[2] See Giandomenico Majone, "*Deregulation or re-regulation: Policy making in the EEC since the Single Act*",in EUI Working Paper SPS nº 93/2, expliciting the problems of social dumping and competitive deregulation under which the countries referred to may attempt to gain advantages by lowering the level of regulatory constraints;

The importance of an International Treaty that would have a broader geographical scope than the one of any Community law instrument is thus clear. Until now, only a few international legal instruments establish a system of strict liability for environmental damage [3], namely the 1989 Basle Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, the International Maritime Organisation Initiative on Liability and Compensation in connection with the Carriage of Hazardous and Noxious Substances by Sea [4] and the 1989 Geneva Convention on Civil Liability for Damage caused during the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels .

Nevertheless, it was still missing a Treaty which specifically concerned itself with environmental liability and regulated it in more general terms and such a treaty was adopted by the Council of Europe a few days before the Green Paper being presented by the EEC Commission.

6.2. THE COUNCIL OF EUROPE CONVENTION

The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment [5] has been open for signature since the 1 of June 1993 [6], not only

[3] According to Alexandre Kiss, "*Present limits to the enforcement of state responsibility for environmental damage*", in International Responsibility for Environmental Harm, Chapter 1, the main solutions adopted by State Parties to several international treaties are strict liability, the person liable for environmental damage is determined by a legal fiction, the competent court is designated and the enforcement of the foreign court decisions is ensured; for a further brief description on the international agreements that have been concluded on limitaton of discharges endagering the environment see Peter Wetterstein, "*Recent Trends in the Development of International Civil Liability*", in Nordic Journal of International Law, 1991, vol. 60, nº 1-2, pp. 51;
[4] See IMO, 10/10/89;
[5] Hereafter "the Convention";
[6] For a detailed description of the procedure which led to the adoption of the present text of the Convention see *Explanatory Report of the Council of Europe Convention*, General Introduction;

to the members of the Council of Europe but also to other non-member States [7]. As mentioned above, problems of transfrontier pollution are not exclusive to the Member States and therefore the enlargement of the geographical scope of such a legal instrument is considered necessary for the protection of the European and of the global environment.

The relation between this Convention and any potential EEC Directive on the same matter raises several interesting questions, for example whether the more environment-friendly EEC Member States will unilaterally ratify the Convention and implement it, instead of waiting for the "dreamed" EEC Directive [8]. At this stage, the Community has to choose, as soon as possible, between ratifying the said Convention or adopting its own Directive on the subject [9]. Furthermore, not only does the Convention specifically express that it is open for signature and subsequent ratification by the EEC itself [10] but even the Green Paper gives serious consideration to this possibility.

6.2.1. Relationship with the EEC legal system

Considering that the EEC Commission was directly involved in the negotiation of this Convention, it seems that the latter has more chances of survival than the EEC draft Directive. In fact, environmental liability law in Europe is evolving in two ways:

[7] The Convention is also open for signature to EEC Member States, to countries of AELE, to the PECOS States and to other non-member States of the Council of Europe, theoretically until the 31 of January 1995;
[8] See Julian Rose, "Civil Liability", in Environmental Science and Technology, vol. 27, nº 5, 1993, pp. 784;
[9] As it will be further concluded, the Commission will have to pursue a cost-benefit analysis to decide whether to ratify the referred Convention or to adopt its own instrument; see also Giandomenico Majone, "*Deregulation or re-regulation: Policy Making in the EEC since the Single Market*":
[10] See article 32º/1 of the Convention;

on one side the EC Commission is having difficulties with the adoption of its draft Directive and on the other side the present Convention has already been adopted by the Council of Europe and is open for signature.

Traditionally, the ratification of international treaties by the EC Member States has been limited by the common rules that have already been adopted by the Community. In other words, if the Community has already promulgated a law on a certain subject, its Member States no longer have the right to negotiate independently on the same subject. They no longer have the right, either acting individually or collectively, to undertake international obligations with third countries which may affect those common rules [11]. Even if this pre-emption system is still predominant, not only has the Community not yet promulgated a environmental liability regime but even if it had done so the Convention provides that in their mutual relations, EC Member States shall apply EC rules on the subject except where these have not yet been adopted [12]. This means that in the relations among EC Member States, the Convention merely fills the gaps where the Community has not yet adopted any common rules and where it adds to rights given by the Parties to the Convention internal law.

Nevertheless, in their relations with third countries the EC Member States will have to apply the provisions of the Convention itself unless their internal law and/or international treaties by which they are bound are more favourable to the "person who suffered the damage". In other words, basing itself on article 60º of the European Convention of Human Rights, the Convention does not limit or derogate any of the

[11] See Wilkinson, pp. 134; see also Case 22/70, *Commission v. Council* in ECJ of 31/3/71, "the AETR case";
[12] See article 25º/2 of the Convention;

victim's rights given by the Parties's internal law or applicable international agreements [13].

Therefore, no conflict should be feared between the Convention and the EC legal regime, also because the Convention bases itself on existing EC law and provides for automatic amendment of its provisions when the EC legal instruments it refers to are modified [14].

6.2.2. The Relationship with other International Instruments

6.2.2.1. The Brussels Convention

The Convention in question contains several provisions regarding competence, recognition and execution of sentences that in some aspects are parallel to those contained in the Brussels Convention [15]. Although the Brussels Convention is not thoroughly discussed in this work its importance is absolute and it is assuring to know that its provisions are applicable when an EC or EFTA Member State are in question.

6.2.2.2. Other International Instruments

Furthermore, the Convention specifically provides that it shall not apply to damage resulting from a transport operation or from a nuclear incident that is duly covered by international or internal law and nor shall it apply where it is incompatible with the rules of the applicable law relating to workmen's compensation or social security schemes [16]. In fact, similar to the EEC draft Directive [17], the Convention specifically excludes from its scope of application the damage caused by a nuclear

[13] See article 25º/1 of the Convention;
[14] See article 31º of the Convention;
[15] See article 19º to 24º of the Convention;
[16] See article 4º/1 to 3 of the Convention and point 45 of the Explanatory Report;
[17] See article 1º/2 of the EEC draft Directive;

substance which is covered by the Paris Convention of 29 July 1960 and the Vienna Convention of 21 May 1963 [18].

6.2.3. Scope of the Convention

In comparison with the EEC draft Directive, the Convention has a much larger scope since it envisages every kind of pollution resulting from dangerous activities. In other words, the intention of the Convention is to ensure adequate compensation for damage resulting from activities that are generally dangerous to the environment.

Furthermore, it applies not only to claims for compensation but also aims at preventing an incident and reinstating the environment and therefore it establishes this system of strict liability permitting few grounds of exemption.

6.2.3.1. Definition of Environment

The Convention recognised the importance of defining the notion of Environment in order to facilitate the compensation for damage to persons and property and also to extend such compensation for damage to the environment [19]. Therefore, in response to the usual criticism made that the legal definitions of environment are too narrow, it provides a non-exhaustive list of resources to be included in this definition.

This list includes not only both abiotic and biotic natural resources, such as air, water, soil, fauna and flora but also their mutual interaction such as the habitat and the ecological balances. It further includes the cultural heritage, meaning the historical and artistic property that represent the environment created by Man within

[18] See article 4º/2 a) of the Convention;
[19] See point 42 of the Explanatory Report;

the natural environment, and the landscape in its cultural and natural characteristic aspects [20].

6.2.3.2. Types of Dangerous Activities to be covered by the Convention

In broad terms, dangerous activities refers to every activity performed at a professional level involving dangerous substances, genetically modified organisms or micro-organisms and operations concerning waste [21]. The "professional level" means that the Convention shall not apply to domestic activities but only covers professional activities i.e. as industrial, commercial and some agricultural or scientific activities [22].

The first formal difference between the draft Directive and the Convention is that the latter establishes liability with respect to a dangerous activity and not by referring to waste [23]. In fact, waste is not defined in the Convention, thereby avoiding the two-tier liability regime of the EEC draft Directive where only hazardous waste gives rise to liability.

Although dangerous activities are defined by referring to "dangerous substances", the above mentioned distinction still has some advantages. First, by accepting that environmental damage can be caused both by the polluting substance and by the use made of it, the Convention reference to dangerous activity establishes distinct liability regimes, according to activity of the person dealing with the polluting substance.

In other words, the Convention seems to be of the same opinion as the European and Social Committee, who, considering that the liability regimes should be different according to the uses made of the wastes, suggested that the EEC draft Directive should distinguish between recyclable and non-recyclable waste [24]. Likewise, the

[20] See article 2º/10 of the Convention;
[21] See article 2º/1 a) of the Convention;
[22] See point 19 of the Convention;
[23] See article 1º and 2º/1 b) of the Draft Directive;
[24] See point 4 of the European and Social Committee Opinion;

Convention recognised the importance of a distinction based on the uses made of a polluting substance and established a separate regime to regulate the permanent deposit of waste [25], and another regime for the other polluting activities [26].

6.2.3.2.1. Waste disposal sites

Therefore, the operation of a waste disposal site is considered a specific type of dangerous activity, since such an operation concerns the permanent deposit of waste, which will not be recycled, indefinitely or for a very long period [27]. The temporary storage of waste is covered by including in the dangerous activities the operation of an installation for the "incineration, treatment, handling and recycling of waste" [28]. These installations or sites are set out in a non-exhaustive list in Annex II; this list covers all the common treatment options such as incineration, sewerage treatment works, chemical recovery, recycling, etc.

6.2.3.2.2. Genetically Modified Organisms and Micro-organisms

Finally, the "production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with" genetically modified organisms and micro-organisms which pose a significant risk for man, the environment or propertyis also considered a dangerous activity . These two categories of organisms are then defined [29], which definitions are based on the Council Directive 90/219/EEC [30], about the contained use of genetically modified organisms, and on Council Directive

[25] See article 7º of the Convention and point 22 of the Explanatory Report;
[26] See Wilkinson, David, "The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment: a Comparative Review", in European Environmental Law Review, May 1993, pp. 130;
[27] See article 2º/2 d) and point 21 of the Explanatory Report;
[28] See article 2º/1 of the Convention;
[29] See article 2º/3 and 4 of the Convention;
[30] See Council Directive 90/219 of 23rd April 1990 in OJEC L117/1;

90/220/EEC [31], which regulates the deliberate release into the environment of genetically modified organisms.

6.2.3.2.3. Dangerous Substances

The Convention defines dangerous substances using three different methods:

a) a first part sets the general criteria according to which the substance or preparation with properties that pose a significant risk for man, the environment or property, are considered dangerous [32];

b) a second method specifically establishes which types of properties are considered to pose the risk mentioned in the first part, according to the criteria referred to in the EEC Directive 67/548 on the Assessment, Classification, Packaging and Labelling of Dangerous Substances [33]. Although the Convention submits the determination of the said properties to the referred EEC Directive it also gives a non exhaustive list of properties, by considering that when a substance is explosive, oxidising, extremely flammable, highly flammable, flammable, very toxic, toxic, harmful, corrosive, irritant, sensitising, carcinogenic, mutagenic, toxic for reproduction or dangerous for the environment it constitutes a risk to man, the environment and property [34].

[31] See Council Directive 90/220 of 23rd April 1990 in OJEC L117/5;
[32] See article 2º/2 a) of the Convention and point 24 of the Explanatory Report;
[33] See supra note and Annex I, part A of the Convention; Council Directive 67/548/EEC of 27 June 1967, in OJEC L196/, on the Approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances as amended for the 7th time by Directive 92/32/EEC of 30 April 1992, in OJCE L154/1 and as adapted to technical progress for the 16th time by Directive 92/37/EEC of 30 April 1992, OJEC L154/30;
[34] See article 2º/2 a) of the Convention;

b) the third part provides that all substances specified in the non-exhaustive list of Annex I, part B [35], and preparations which contain one or more of the listed substances, are dangerous substances [36];

Although these two final methods ensure a desirable degree of certainty, the operators will have to bear in mind that the three methods are not mutually exhaustive. In considering whether a certain substance is dangerous, one shall analyse if it is included in the list mentioned in Annex I, part B and if not, whether the substance contains properties mentioned in the second method. Finally, if this is not the case, substances and preparations will still be classed as dangerous if they pose a significant risk to man, the environment or property, thereby fulfilling the general criteria [37].

One should note that here, as with the genetically modified organisms or micro-organisms, the Convention constructs its liability regime by effectively using an existing EEC regulatory instrument [38]. In this case, the advantage of doing so is that it avoids the difficulties in approving substance lists, such as delays [39] or the agreement with future amendments [40].

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[35] See Annex I, part B of the Convention; the list has been modified and extended by Annexes I and II of the Directive 92/37/EEC but it is not reproduced in the Official Journal;
[36] See article 2º/2 b) of the Convention;
[37] See point 26 of the Explanatory Report; For a very interesting comment on this final *praesumption iuris et de iure* that some substances pose a significant risk see W. J. Ouwerkerk, "*Environmental Liability from the perspective of an operator: Council of Europe Draft Convention on Civil Liability*" in Transnational Libility and Insurance, Part C, Chapter 3, considering that such general presumption is in conflict with the law in Paracelsus (1493-1541): "All substances are poisons; there is none which is not poison. The right dose differentiates a poison and a remedy";
[38] See Wilkinson, pp. 131;
[39] See the evolution of the Council Directive 76/464/EEC, known as the dangerous substances framework directive which did not refer to a previously established substance list;
[40] See article 31º of the Convention which provides for an automatic incorporation of the amendments made to the Annexes of the referred Directives;

6.2.4. Liability Principles

6.2.4.1. Strict liability or fault liability

Unlike the EEC Proposal, the Convention only states that the explorer is responsible for the damages he caused without explicitly establishing that such liability shall be strict. Nevertheless, it is clear that the Explanatory Memorandum of the Convention defends a system of strict liability in order to guarantee an adequate compensation of the damages [41] and to encourage the operator to adopt every useful measure to avoid any future damages [42]. On the other hand, as does the EEC Proposal , the Convention also links operational liability to civil liability as will be seen next.

6.2.4.2. Responsible party

Contrary to the EEC Proposal, in the Convention the primary responsibility lies not with the producer of waste but with the operator of the dangerous activity or of the waste disposal site [43]. In other words, liability for a dangerous activity attaches to the operator who is defined as any person, of a public or private nature, in control of a dangerous activity [44], which definition seems broad enough to cover the activities of any individuals or body, whether corporate or not, including the State and its subdivisions [45].

Like lender liability, the crucial concept of this definition is the notion of control which shall exist when the person is effectively and globally in charge of the activity, for example if it has the legal, economical and/or financial power to determine how

[41] See Explanatory Report to the Convention, point &7;
[42] See Explanatory Report, point & 51;
[43] See article 6 and 7 of the Convention;
[44] See article 2 of the Convention;
[45] See article 2º/6 of the Convention and point 32 of the Explanatory Report;

the dangerous activity is carried out. Therefore, it is the employer that shall be considered the operator and the courts can use the national administrative systems, responsible for the licensing of most dangerous activities around Europe and identify in advance the person that shall be held responsible for the licensed activity [46].

Nevertheless, as it does in relation to the producer of waste, the Convention also justifies the attachment of liability to the operator because he is best able to avoid the damage or limit its extent. Furthermore, if it is the operator's activity that caused the damage, channelling the liability to him guarantees an effective application of the "polluter pays" principle, since he will transmit this financial burden to the price of his products or services [47].

Once more, the Convention shows its affinities with CERCLA [48] by channelling the liability to the owner or explorer of the waste site in question [49]. In fact, the United States CERCLA legislation considers all past and present owners or operators of certain facilities potentially liable for clean up costs. However, the Convention differs from the Draft Directive and also from CERCLA in one specific aspect, namely in the distinction of regimes according to whether the dangerous activity is current or has ceased and the situation where such activity is the permanent deposit of waste [50].

On the one hand, in relation to dangerous activities, the liability is channelled to its explorer at the moment when the incident causing the pollution occurred [51]. On the other, as far as the site of permanent deposit of waste is concerned the liability is

[46] See point 30 of the Explanatory Report.
[47] See point 29 of the Explanatory Report;
[48] The Comprehensive Environmental Response, Compensation and Liability Act, pub. L96-510, 94 State 267 (1980), codified at 42 USC SS 9601-9657 1982 Supp. IV 1986;
[49] See Green Paper, pp. 31;
[50] See infra paragraph on retroactive liability; see also Wilkinson, pp. 132 ;
[51] See article 6º/1 of the Convention;

channelled to the owner of the site at the moment when the damage appears or to the last owner if the site has been closed in the meantime [52].

6.2.4.3. Lender liability

Unlike the Draft Directive or the Green Paper, the Convention implicitly refers to a secured lender exemption, although under relatively tight conditions. In fact, in Explanatory Report's comments it is specified that any outside person "who has made it possible or facilitated a dangerous activity, for example by lending funds for investment, may not be considered to be the operator, unless he exercises the effective control over the activity in question" [53].

This may well mean that the Convention tends to protect the banks and other lending institutions from being held liable for their borrowers polluting activity, which they do not control. Nevertheless, it remains questionable to what extent such persons are considered to be "in effective control" over the activity in question, which doubt is only clarified in relation to creditors holding collateral over certain equipment. In fact, the final part of the comment states that those "creditors who exercise their rights by virtue of sureties held on equipment required for the dangerous activity" are not its operators and therefore shall not be considered liable for the damage caused by the polluting activity.

Although such a conditioned exemption seems to include both the shareholders and the creditors it is difficult to conceive a case where these lenders could be considered operators according to the meaning given by the Convention.

6.2.4.4. Information right

[52] See article 7º/1 of the Convention;
[53] See point 31 of the Explanatory Report;

It is interesting to exmine the introduction of a right of access to environmental information basically similar to the provisions of the Council Directive on the Freedom of Access to Information on the Environment [54]. Nevertheless, the Convention's information right is not limited to the information in the hands of public authorities, as it is in the EEC draft Directive, but it also regards the information in the possession of the "operator", that is, the person who is in control of the dangerous activity [55]. Furthermore, the Convention contains no obligation to publish a periodic report on the state of the environment..

Although such a right is subject to several restrictions to be established by internal law, for example in the cases of information considered confidential or commercial secrets, it may prove helpful for the plaintiff to obtain the "specific information necessary to establish his right to a compensation" [56]. In fact, the Convention establishes seven situations in which the right of access may be restricted under internal law, especially because it would affect the confidentiality of public proceedings, international relations and national defence, matters of public defence and which are currently under investigation, the confidentiality of personal data or the interests of the environment concerned [57].

In relation to information held by public authorities, any natural or legal person may request such information without having to demonstrate a specific interest or that a damage has been caused [58]. Nevertheless, such a request may be refused if it is manifestly unreasonable or formulated in too general a manner or if it involves unfinished documents or data or internal communications. This refusal must be

[54] See Council Directive of the European Communities 90/313/EEC of 7 June 1990, L 158/56;
[55] See article 16º of the Convention;
[56] For the several circumstances in which the right of access may be restricted or refused see article 14º/2 and 3 of the Convention;
[57] See article 14º/2 of the Convention;
[58] See article 14º/1 of the Convention and point 71 of the Explanatory Report;

clearly funded and if the person requesting the information disagrees with its decision it may seek a judicial or administrative review according to his internal legal system [59].

On the other hand, in relation to information held by the operator, the victim of the damage and/or the operator may request a court order of specific information held by operators [60].

6.2.5. Standing

6.2.5.1. Public authorities

The Convention defines public authorities not in general terms but only in relation to the environmental information they possess and are required to provide. In this sense, public authorities are "any public administration of a Party at national, regional or local level with responsibilities" with the exception of bodies in a judicial and legislative capacity [61].

Nevertheless, the Convention does not specifically refer to the public authorities as potential parties in a law suit brought under its provisions. It seems that the standing of public authorities and of individual private parties is left to be decided by the Contracting Parties's internal law.

6.2.5.2. Environmental Associations

Although clearer than the Directive, the Convention seems to restrict the range of persons who may bring a legal action for environmental damage by limiting this possibility to the associations or foundations which have as their object the protection

[59] See article 14º/4 and 5 of the Convention;
[60] See article 16º of the Convention;
[61] See article 13º of the Convention;

of the environment and only as long as they satisfy any other conditions established by the internal law of the Contracting Party where the request is submitted [62]. Such organisations may request the prohibition of an unlawful dangerous activity, which poses a grave threat of damage to the environment; and that the operator be ordered to take preventive or reinstating measures.

Furthermore, each Contracting Party may stipulate which judicial or administrative body shall receive such a request and it may also require that these organisations have their "registered seat or the effective centre of its activities" in their own territory [63]. Nevertheless, each Party may make a declaration of reciprocity according to which those organisations having their seat and complying with the legal conditions of another Party shall also have the right to submit a request [64].

6.2.6. Remedies

The Convention is much clearer and more precise regarding which parties can sue for which remedies, in that it specifies the organisations that may sue to obtain an injunction or interdiction. As mentioned above, only certain organisations may submit a request to the courts to prohibit a dangerous activity, if said activity is unlawful and poses a grave threat of environmental damage. They may also request that the operator be ordered to take measures to prevent an accident and/or a damage or to undertake the necessary reinstating measures [65]. Nevertheless, as in the EEC proposed Directive, these possibilities may in certain cases, be restricted by the internal law of the Contracting Party [66].

[62] See article 18º/1 of the Convention;
[63] See article 18º/3 and 5 of the Convention;
[64] See article 18º/5 of the Convention and point 83 of the Explanatory Report;
[65] See article 18º/1 of the Convention and point 80 of the Explanatory Report;
[66] See article 18º/2 of the Convention;

6.2.6.1. Compensation for Impairment to the Environment

Furthermore, the Convention also provides for the compensation for impairment to the environment, although it limits such compensation to the costs of measures of reinstatement "undertaken or to be undertaken". This concept of measures of reinstatement is of prime importance since such measures aim at restoring the situation of the environment to that existing before the damage, even when there is no damage to person or property [67].

In other words, measures of reinstatement are those measures taken within reasonable limits which aim at reinstating or restoring "the damaged and destroyed components of the environment" [68]. When this reinstatement of the environment is not feasible, such measures consist instead in the "introduction of the equivalent to the damaged or destroyed components into the environment" [69].

Although it seems that loss of profit arising from impairment to the environment may be compensated for, the Convention does not provide for general indemnification for such impairment to the environment.

Limitations of Liability

Contrary to the EEC position the Convention does not establish any type of financial limits or ceilings. In this particular aspect, the Convention totally differs from all the others international instruments which usually adopt certain financial limits

[67] See point 39 of the Explanatory Report;
[68] For another type of distinction see Robert E. Godin, "*Theories of compensation*" in Liability and Responsibility: Essays in law and morals, according to which there are two kinds of compensation: means-replacing which provides people with the equivalent means for pursuing the same ends, and ends-displacing;
[69] See article 2º/8 of the Convention;

regarded as essential in the agreement upon any conventional liability regime [70]. Nevertheless, if any international convention on liability accepts limited liability it should also provide for flexible mechanisms for adjusting its limitations amounts, thereby avoiding constant decreases in the real value of compensation amounts due to inflation.

6.2.7. Burden of proof

6.2.7.1. Causal link

Although the traditional discussion is the choice of strict or fault liability one of the most important aspects of a system of environmental liability remains the causal link between the incident and the damage. Contrary to the Draft Directive the Convention does not specify which burden of proof link shall be required to establish the causal link between the incident and the damage but only requires that certain risks shall be taken into account by the court. In fact, the Convention has almost created a presumption of causal link following the present trend to facilitate the plaintiff to prove the causality in question.

Therefore, the Convention orients the court towards pondering the evidence concerning the causal link between the polluting incident or the permanent deposit of waste and the damage by requiring the court to take into account the increased risks of causing such damage inherent to such dangerous activity. In other words, the Convention facilitates the plaintiff's burden of proving the causal link between the polluting incident and the damage he suffered, by establishing that the specific risks a

[70] See again Peter Wetterstein, *supra* note , who not only analysis the 1976 Convention on Limitation of Liability for Maritime Claims but also confirms that in the maritime field it is common to limit liability even in those countries that have not acceded to a particular convention;

certain dangerous activity poses in causing a specific type of damage should be duly considered [71].

6.2.7.2. Joint and Several liability

Contrary to the EEC position on the subject, the Convention does not generally establish joint and several liability between all the persons responsible for the environmental damage. In principle, only the operator who was in control of the dangerous activity at the time the polluting incident took place, will be held responsible for the damage caused [72].

Notwithstanding this formulation of its strict liability system, the Convention established three specific situations in which several operators may be held jointly and severally liable. The first is when the incident which causes the damage consists of a continuous occurrence; the second is when the incident consists of a series of occurrences having the same origin. The operators successively exercising the control of the dangerous activity and those exercising such control at the time of any such occurrence, may be held jointly and severally liable [73]. Finally, the third situation is when the damage results from several incidents which have occurred in several installations or sites, for example cases of synergistic pollution [74]. In these situations, each operator of all such sites shall be held jointly and severally liable for the whole amount of the damage [75]. This means that the plaintiff may choose which operator to sue, but he still has to prove the damage, the occurrence of an incident in the installation of the operator as well as the causal link between this incident and all or part of that damage

[71] See article 10º and point 63 of the Explanatory Report;
[72] See article 6º/1 of the Convention;
[73] See article 6º/2 and 3 of the Convention ;
[74] See point 64 of the Explanatory Report;
[75] See article 11º of the Convention;

In any of these cases, if the operator proves that the damage is divisible and that only part of the damage was or could have been caused during the period he controlled the activity, he shall only be liable for that part of the damage [76]. On the other hand, if he can not provide such proof, he will be liable for the full amount of the damages to be paid but will be able to exercise all rights of recourse, available under internal law, against third parties, in particular against the producer of waste or other operators [77].

Such a provision clearly differentiates the Convention principle of joint and several liability from that proposed by the EEC draft Directive, since the latter does not specifically provide the possibility for the defendant to limit his liability to the part of damage caused by his waste [78]. In the end, the Commission recognised in the Green Paper that such a joint and several liability rule has some disadvantages, namely the increase of contribution actions in the courts and the appearance of the deep pocket syndrome [79]. It also suggested that these disadvantages could be fought by channelling liability in a previously established order and/or by forbidding the right of recourse from the other responsible parties. However, the present system seems more efficient in that it enables the operator to prove that only part of the damage has been or could have been caused by his activity.

6.2.8. Defences

In principle, the Convention tends to limit the exemptions from liability, in order to assure that the damages to which it applies are adequately compensated for. This

[76] See article 6º/2 and 3 of the Convention and point 52 of the Explanatory Report;
[77] See article 6º/5 of the Convention and point 54 of the Explanatory Report ;
[78] See article 5º of the Amended Proposal for a Directive on Civil Liability for damages caused by waste;
[79] See point 2.1.4. of the Green Paper and chapter 3, paragraph 5 b);

trend may be considered too severe since, as in the EEC proposed Directive, the Convention does not provide for any financial ceilings and does not even enable the Contracting Parties to adopt such ceilings as an option.

However, since the Convention does not apply exclusively [80], it allows the person who suffered the damage to bring a claim for compensation under internal law and/or under applicable international agreements, if these are considered more favourable. Whereas this possibility embraces both the provisions existing before or adopted after the Convention entered into force, it is unclear whether the Contracting Parties may restrict the grounds of exemption [81].

6.2.8.1. Force Majeure

In situations of *force majeure*, the operator shall be exempted from liability if he proves that the damage in question "was caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character", thereby adopting the classic definition of *force majeure* in international law [82].

This was also the definition adopted by the Parliament in the amendments suggested to the EEC proposed Directive, since it considered the definition given by the ECJ unsuitable for the field of environmental liability [83]. Although this classic definition is usually criticised by the civil doctrine the internal disparities in the concept of *force majeure* demand a certain harmonisation. However, there are doubts as to whether another solution of a general definition complemented by concrete examples of *force majeure* would not be preferable [84].

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[80] See article 25º/1 of the Convention;
[81] See point 61 of the Explanatory Report;
[82] See article 8º/a) of the Convention;
[83] See Chapter 5 on Community law, point 6 b);
[84] See Thieffrey;

6.2.8.2. Fault or Interest of the Injured Party

Similar to the EEC proposed Directive, the Convention also provides for the reduction or disallowance of the defendant's liability, if the victim of the damage, or any person under his responsibility, has contributed to the damage [85]. However, unlike the doubts raised by the text of the Directive [86], it is here necessary that the injured person, or the person under his responsibility, has by his own fault contributed to the damage. In other words, either the defendant proves that the faulty conduct of such persons has contributed to the damage or the court must, at its own discretion, demonstrate that fault.

Another innovative exemption is given to the operator if he proves that the damage was caused "by a dangerous activity taken lawfully in the interests" of the victim and where it is considered reasonable to expose this victim to the risks of said dangerous activity [87]. In this situation, it is not the fault but the interest of the injured person that exonerates the operator but thisconcept of interest must also raise some doubts regarding its possible interpretations; these doubts may be limited by the remaining conditions of exemption.

Admitting that this particular exemption is mainly concerned with those emergency cases or situations where the person who suffered the damage gave his consent to the dangerous activity, the courts must previously conclude for the fulfilment of certain prerequisites. First of all, the dangerous activity must have been lawful and the consent of the victim must have been real and unequivocal. Finally,

[85] See article 9º of the Convention and point 62 of the Explanatory Report;
[86] See chapter 3, paragraph D, 6/a);
[87] See article 8º/e) of the Convention;

the polluting action must be reasonable in relation to the risk incurred in the dangerous activity[88].

6.2.8.3. Contributory Acts of Third Parties

Another exemption similar to that proposed by the EEC draft Directive, is the one establishing that the operator shall not be liable if he proves that the damage was caused by an intentional act of a third party, despite the adequate safety measures taken by the operator [89]. In other words, if a third party's intentional conduct is considered to have caused the damage the operator will not be held liable as long as that conduct is outside his control.

6.2.8.4. Authorisation by Public Authorities

Although the Convention only provides for exemptions to the operator's liability under very specific and limited conditions, it is clear that it is more "generous" in the defences it make available than the proposed EEC Directive. For example, by excluding the operator from liability if the damage "resulted necessarily from compliance with a specific order or compulsory measure of a public nature" [90], the Convention seems to exclude the complying operator from liability. According to this concept, why should an operator be held liable if he has strictly complied with the orders imposed by a public authority?

Nevertheless, the Convention did not go so far as the Green Paper which suggested that the public authorities that have granted a certain pollution permit should be held liable for the damage caused by the authorised operator,where the latter has fully complied with the limits set. The Convention does not state as to

[88] See point 61 of the Explanatory Report;
[89] See article 8º/b) of the Convention;
[90] See article 8º/c) of the Convention;

whether the public authority who issued the public order in question should be held liable instead of the operator who only followed its orders.

6.2.8.5. Acceptable Level of Pollution

The Convention provides that damage caused by a tolerable level of pollution, determined in the light of local relevant circumstances, shall not be compensated for. In other words, considering that its regime of strict liability should not be extended to cover all acceptable inconveniences, the Convention established that an acceptable level of pollution may be a ground for exemption under certain circumstances [91].

However, since the Convention does not apply exclusively it allows for this damage to be compensated for under other existing legal regimes, for example on the basis of the law relating to nuisance [92].

6.2.9. Limitation periods

6.2.9.1. Expiration Periods

The need for a harmonised expiration period among the Member States had already been recognised by the EEC, which proposed in its draft Directive an harmonised time limit within which a legal action may be brought, thereby avoiding situations of forum-shopping which could occur due to the differences between the internal laws of the States [93].

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[91] See article 8º/d) of the Convention and point 60 of the Explanatory Report; in relation to italian law see Salvatore Patti, in Dizionari del Diritto Privato, Vol.1. "Diritto Civile - Ambiente, Tutela Civilistica" refering to article 844º of the Civil Code which has been interpreted so that the land owner should tolerate the emissions of gases, heat and noises which do not go beyond normal standards, taking into account the local circumstances;
[92] See point 38 of the Explanatory Report;
[93] See point 76 of the Explanatory Report;

Likewise [94], the Convention also adopted an expiration period of three years from the moment the claimant knew or should have known of the damage and of the identity of the operator [95]. According to the discussants of the Convention, the legal proceedings for the recovery of damages shall be barred upon such an expiration period "for the better administration of justice and the avoidance of abuses" [96]. However, this expiration period can be suspended or interrupted according to the internal law of the Contracting Parties.

Furthermore, a general expiration period was also established, according to which the right to bring a legal action shall be extinguished after thirty years "from the date of the incident which caused the damage" [97]. The main concern in establishing such a time-limit is to give the operators and the insurers the required legal certainty about the date after which no actions can be brought [98].

Despite the similarities with the proposed Directive concerning the formulation of this general expiration period, the Convention does not leave the term "incident" to the arbitrary interpretation of the courts or of the national legislator. On the contrary, the Convention specifically establishes the commencement date of this expiry period according to the different possible interpretations the term incident. For example, if the incident refers to a continuous polluting occurrence or series of occurrences withthe same origin, the expiry period shall run from the end of such occurrence or of the last of the series of occurrences. Furthermore, with regard to the sites for permanent deposit of wastes, the same period runs at the latest from the date when the site was legally closed [99].

[94] See article 9º/1 of the Original Proposal;
[95] See article 17º/1 of the Convention and point 77 of the Explanatory Report;
[96] See point 77 of the Explanatory Report;
[97] See article 17º/2 of the Convention;
[98] See point 79 of the Explanatory Report;
[99] See article 17º/2 of the Convention and point 78 of the Explanatory Report;

6.2.9.2. Retroactive application

Similar to the EEC Commission view on the subject, the Convention is only applicable to the polluting incidents which occur after its coming into force. In broad terms, this means that liability under the Convention is not retroactive and applies only to incidents occurring after the entry into force of its provisions in a certain party

The Convention goes even further and states that in situations of continuous polluting occurrences or of series of occurrences having the same origin, its civil liability system applies only to damages caused by occurrences which took place after its provisions were in force [100]. This means that an activity performed before the entry into force of a certain liability instrument should not be unduly punished under civil liability law, since the collectivety had not previously forbidden it.

Therefore, in relation to permanent waste deposit sites liability is also not fully retroactive since the Convention only applies to the damage which becomes known after its entry into force. By considering irrelevant the moment when the incident causing the damage occurred, the Convention places the operators in a difficult situation because either they must now reveal any environmental damage they are aware of and will thus not be sued under the Convention or they do not reveal this information, meaning they may be held liable in the future. If they do reveal suh information now, however, there is always the risk that they may face a claim for compensation according to internal law.

Furthermore, liability is also fully excluded in two specific situations, namely when the site was closed in accordance with internal law before the entry into force of the Convention and when the operator of an on-going site proves that the damage is the

[100] See article 5º/1 of the Convention;

unique result of waste deposited there before its entry into force [101]. The closure of the site must be in accordance with the provisions of internal law in order to avoid the operators abandonment of the sites under their control without taking the necessary measures to prevent future damage.

6.2.10. Insurance

The Convention requires that the operator must obtain some form of insurance or other type of financial guarantee up to a certain limit [102], which obligation has raised several criticisms and concerns in industry's representative bodies. This obligation is made indirectly, by requiring the Contracting Parties to ensure under their national laws that the operators "participate in a financial security scheme" to cover the liability that may arise under the Convention. In determining the scope, conditions and form of such a scheme the Contracting Parties should take into account the risks of the activity that will be subject to it.

Finally, to return to what was said regarding environmental insurance in the EEC [103], the Green Paper pointed out one of the major problems of insuring environmental damage, which is if insurance is to be made compulsory it should be available in the market at a reasonable price and/or conditions. Likewise, the Explanatory Report of the Convention also shows a certain concern over the lack of expertise the European insurance sector seems to have, most specifically in the evaluation of the risks to the environment.

Furthermore, among the possible types of schemes should be considered not only the more drastic solution of compulsory insurance but also the possibility of insurance

[101] See article 5º/2 of the Convention and point 49 of the Explanatory Report;
[102] See article 12º of the Convention;
[103] See Chapter 2, paragraph 8;

contracts, self-insurance and mutual funds [104]. In fact, with the development of the environmental insurance market it is probable that the more traditional financial security schemes will be substituted by insurance contracts

6.2.11. Compensation Fund

Since the "polluter pays" principle leads to the consequent internalisation of environmental costs it is required that the operator should be held responsible for the damages caused by the activity under his control. Nevertheless, other forms of sharing such risks among the collectivety seem advisable, namely through insurance and/or compensation funds.

These compensation funds allow for a more rapid and efficient compensation of the damage suffered and lighten the individual burden of the inherent liability costs, in comparison with the classic civil liability system which requires previous, sometimes slow and costly legal proceedings. Nevertheless, it is still in doubt whether compensation funds should or should not be limited to those situations were civil liability can not be used to compensate environmental damage, for example, when the polluter has seized its activities or is unknown [105].

Unlike the EEC Commission position on the subject, the Convention does not specifically regulate or refer to potential compensation funds. However, by requiring the Contracting Parties to ensure that operators have financial security to cover their liability, the Convention allows for these Parties to establish whatever forms of

[104] See article 12º of the Convention and point 67 of the Explanatory Report;
[105] See Volkmar J. Hartje, "*Oil Pollution by tanker accidents: liability versus regulation*", who agrees that compensation funds for oil pollution may improve the level of compensation but not the incentive to improve tanker risks since they do not discriminate beween different risks of individual tankers;

financial schemes they find suitable [106]. One of the various possibilities specifically referred to is a scheme according to which the operators controlling a specific branch of dangerous activities financially co-operate with each other in order to guarantee adequate compensation for the damage caused by the activity performed by any one of them [107]. This is a type of compensation fund which would be maintained by contributions from the operators controlling the dangerous activity and its mutual basis should encourage a better environmental protection [108].

[106] See article 12º of the Convention;
[107] See point 67 of the Explanatory Report;
[108] For examples in what relates to marine oil pollution see Jan C. Bongaerts and Aline F.M De Bièvre, "*Insurance for Civil Liability and Compensation for Marine Oil Pollution*", who defines the Protection and Indemnity Clubs (P&I), established under the International Convention on Civil Liability for Oil Pollution Damage (CLC), as non-profit associations collecting fees from their members in order to reimburse claims brought against them;

CHAPTER 7

CONCLUSIONS

7.1. FUTURE INSTRUMENT ON CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE

The perspectives on the adoption of an EC instrument about civil liability for environmental damage have already been referred to [1], but the question remains as to whether it is advisable for the EC Member States to sign the Council of Europe Convention. The different opinions range from considerations that the Convention was drawn up by chosen legal experts without adequate discussion among all the interested parties [2] to the idea that this Convention expresses the Community position on the subject since the Commission and the EC Member States were involved in its negotiations and therefore its adoption would create a uniform strict liability regime to be applied throughout Europe. Perhaps the Commission should carry out a cost-benefit analysis to decide whether it should ratify the Council of Europe Convention or adopt its own legal instrument on the subject [3].

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[1] See Chapter 5, paragraph

[2] See Giandomenico Majone, "*Deregulation and re-regulation: policy making in the EC since the Single Act*" in EUI Working Paper in SPS nº 93/2, paragraph 4, who confirms that the real costs of most regulatory programmes are borne directly by the individuals and firms who have to comply with them and therefore their opinion should be taken into account in any future instrument on civil liability for environmental damage;

[3] See Rénaud Dehousse, Christian Joerges, Giandomenico Majone and Francis Snyder in "*Europe after 1992 - New Regulatory Strategies*" referring that the Commission should take a cost/benefit analysis of its own proposals; also Giandomenico Majone, "*Controlling Regulatory Bureaucracies: Lessons from the American experience*" according to which by comparing social benefits produced by

However, if there is a conclusion to be drawn from the comparison made in the previous Chapters it is that there is no perfect civil liability system to deal with environmental damage, although some of the criticisms made of both the above-mentioned instruments may serve to stimulate various questions that should be raised by any future legal instrument on the subject.

7.1.1. Scope of a potential Legal Instrument on Civil Liability for Environmental Damage

With regard to the main definitions that such a future instrument should contain here the conclusions that have been reached during the preceding chapters will be briefly reiterated.

7.1.1.1. Definition of Environment

First, a harmonised concept of environment should be specifically established, thereby avoiding any possible divergence's that may arise from the various interpretations made by the implementing national legislation's. This should, considering that the compensation of environmental damage bases itself on the definition of environment [4], be comprehensive enough to include all those elements considered legally relevant. In other words, it would seem that any future instrument on civil liability for environmental damage should adopt a broad definition of

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the regulation to be adopted with its full administrative and economic costs, the requirement for such cost-benefit analysis disciplines the institutions decisions;
[4] Following the thoughts expressed in the Green Paper that the environment needs to be defined in order to define damage to the environment;

environment, thereby including not only the natural elements but also the social, cultural and economical aspects that surround a human being [5].

7.1.1.2. Definition of Environmental Damage

Likewise it also seems of vital importance to define environmental damage in order to determine which injuries can be compensated via civil liability law [6], which question is directly connected with the notion of reparable damage. In the formulation of this definition, the unusual characteristics of this type of damage should be taken into account. Therefore, a general definition of environmental damage should comprise two different concepts, namely a stricter one of "impairment" to the environment and a broader one that shall also include damages to person and property .

First, impairment to the environment means any deterioration of the different components of the environment, namely of its natural, social, cultural and economical elements. Second, environmental damage should also include the death and physical injury sustained by a private individual and the damage to private property. The concept of property damage should be extended to include not only the physical damage to, destruction or loss of tangible property but also the loss of economic use of tangible property not physically damaged [7].

7.1.1.3. Type of activities to be covered

[5] See Chapter 2, paragraph 2.1.;
[6] See Chapter 2, paragraph 2.2.;
[7] See Patrick Reyners, "*Compensation for nuclear damage in the OECD Member Countries*" in Compensation for Pollution Damage, Chapter 4, who also thinks that the damage to property should cover the loss thereof (*damnum emergens*) but also the temporary deprivation, loss of use and/or loss of profit (*lucrum cessans*);

It is also necessary to legally determine the polluting activities and/or substances to which any liability regime for environmental damage shall apply,by taking into account the types of hazards posed by the different economic activities and/or substances, the probability and extent of damage they may cause and the feasibility of compensating for such damages .

Of the two instruments analysed , the solution presented by the Council of Europe Convention seems preferable, since the partial harmonisation made by the EC has recently been considered inconvenient, namely by the Green Paper.

7.1.1.4. Exclusions from the scope

In order to avoid an unnecessary overlapping of different liability rules, some of the existing environmental legal instruments should be excluded from the scope of a future instrument. In fact, consideringthat several international agreements already establish an harmonised liability regime for specific types of activities and/or products, any future instrument should not apply to those damages duly covered by international law.

Therefore it may sufficeto provide for an exclusion similar to the provisions established by both the Draft Directive and by the Convention, according to which they shall not apply to damage caused by nuclear waste and oil pollution covered by enforceable international law, namely the Paris Convention and the Brussels Convention [8].

7.1.1.5. Geographical scope

At first sight, it seems evident that the geographical scope of any future instrument should not be limited to the EC Member States but a broader extent may

[8] See Chapter 5, sub-paragraph 5.4.1.3. and Chapter 6, sub-paragraph 6.2.2.2.;

face deeper enforcement and implementation problems. Therefore it may prove easier to proceed with a more limited harmonisation that may nevertheless be extended to other European countries outside the EC.

7.1.1.6. The Brussels Convention

With regard to court jurisdiction, the solution given by the Brussels Convention should be adopted.According to this the victim can freely choose the court in which he will sue the person responsible for the environmental damage [9]. In other words, the victim may bring a legal action either in the jurisdiction where the damage occurred - *locus damni* - or in the courts whose jurisdiction cover the origin of the said damage - *locus actus* [10].

However, the Brussels Convention does not address the question of choice law which has long been subject to intense discussion within the Hague Conference on Private International Law. Although the latter has given serious thought to the possibility of adopting a convention regulating the choice law in transboundary environmental suits, an interesting alternative for a future instrument on civil liability for environmental damage would be to allow the plaintiff to choose the jurisdiction where we will sue [11] together with an increased harmonisation of national law on a basis of strict liability for environmental damage.

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[9] See 1968 Brussels Convention (EEX) "On Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters"; see for an example, ECJ Case 21/76, *Handelwekerij G. J. Bier v. Mines de Potasse de Alsace SA*, RJE, 1977, 323;

[10] For a more detailed analysis see Jessurun d'Oliveira, "*Class Actions in Relation to Cross-Border Pollution*", who questions the possibility given by article 24º of the EEX of granting interim relief, since national judges must then have the power to bind parties to act in another Member State;

[11] See Alan E. Boyle, "*International Law and Transboundary Access to Environmental Justice*" in the Conference Access to Environmental Justice in Europe who examining the different issues of private international law with regard to transboundary environmental justice, justifies this solution of forum shopping by the possibility of the plaintiff deciding which system offers the most advantageous procedures, procedural rules, substantive rules and remedies, thereby maximising his chances of recovery;

7.1.2. Liability principles

7.1.2.1. Strict liability or fault liability system

In the recent discussion launched by the EC Green Paper certain business Federations, representing potential polluting industries, have voiced their disagreement with the introduction of a system of strict liability for environmental damage. According to them, such a system would penalise those operators who have complied with every environmental law but are still held liable even if they acted with all due diligence [12]. However, recent developments seem to indicate that such a system of strict liability is more likely to encourage potential polluters to better manage the environmental risks of their activities and/or increase the preventive measures to be taken [13].

Under a pure system of strict liability for environmental damage, the injured person will never have to prove that the defendant acted with fault, but he will have to establish the causal link between the injury suffered and the polluting incident caused by the activities under the defendant's control. Without repeating all the discussion regarding the pros and cons of both fault and strict liability systems it seems that the latter is more likely to enable civil liability to act as an efficient mechanism of environmental protection [14], since the plaintiff does not have to establish what

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[12] Following the same belief, W. J. Ouwerkerk, "*Environmental Liability from the perspective of an operator: Council of Europe Draft Convention on Civil Liability*" in Transnational Liability and Insurance, Part C, Chapter 3, who considers that a system of strict liability can be counter-productive, if the good operators applying high standards withdraw from the market to contain their potential exposure to liability not justified by the diligence with which their operations are conducted;

[13] For another perspective see also Ernest J. Weinribb, "*Liberty, community and corrective justice*" in Liability and Responsibility: essays in law and morals, according to which strict liability maximises the protection of the victim of other's actions and therefore maximises the role of state officials in the provision of this protection;

[14] See also Chapter 5;

constitutes due diligence or to prove a failure of the defendant to meet an environmental standard [15].

Nevertheless, in the preceding Chapters it also became clear that for an efficient functioning of such a strict liability system it is necessary to clearly determine the activities under its scope [16], the parties to whom liability should be channelled and any other limitations.

7.1.2.2. Responsible Party

As has been previously said, it is absolutely necessary to determine the parties to whom liability should be channelled but such a task is directly dependent on the scope of the liability instrument to be adopted. On the one hand, the draft Directive channelled the primary liability to the producer of waste because it considered that the latter is the economic operator with the best knowledge of the nature and characteristics of his waste. On the other hand, according to the Council of Europe Convention, primary liability lies with the explorer of the dangerous activity or to the operator of a waste disposal site.

Although the responsible party seems to differ in the instruments referred to, both of them attach liability to the person they consider to be in the better position to avoid any environmental damage and/or limit its extent. Following this same tendency, the Green Paper suggested that liability should be channelled to the party having the best

[15] See Alan Boyle, "*Making the polluter pay ? Alternatives to State responsibility in the allocation of transboundary environmental costs*" in International Responsibility for Environmental Harm, Part 5, Chapter 15, who considers that one of the utilities of a strict liability regime is that it depends only on the fact of harm and the proof of source;

[16] See again point 2.1. of the Green Paper, according to which to determine whether a certain activity should be subject to a strict liability regime the following elements should be taken into account: types of hazard posed by the activity; probability and extent of damage; incentive for better risk management and prevention of damage; feasibility and cost of restoring the damage; potential financial burden on the economic sector; need for availability of insurance;

technical knowledge, the larger resources and the effective control of the activity. However, this reference to the party having the larger resources has raised some doubts as to whether it would stimulate the "deep pocket syndrome" [17].

Finally, taking into account the "polluter pays" principle it seems preferable to choose the suggestion made by the Council of Europe Convention to link operational liability to legal liability but such linkage should extend itself to those situations where the person controlling the polluting activity is not identifiable. In other words, in defining the responsible party the best way is to connect it through legal, economical and/or financial power to determine how the activity is carried out to the party having effective control of the activity, that is to the person who is effectively and globally in charge of the activity.

7.1.2.3. Lender Liability

As has already been stated, banks may have a very important role in the prevention of environmental damage, and therefore making them liable for past damage or damage caused by their borrowers' activities should be avoided. In fact, the question about to what extent banks and other financial institutions can be held liable for the polluter activities to whom they have lent money or leased equipment is one about which most legislators are hesitant. The various points of view allaccept that any provisions about the responsible person should clarify whether this establishes a lender liability exemption as does the Superfund [18].

[17] See Chapter 4;
[18] Although the American Superfund imposes strict liability on a purchaser of contaminated property, even if he has not contributed to such contamination, it also provides a defence against liability for a purchaser who conducts all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice; the use of this innocent purchaser defence can be extended to exempt the banks or other financial institutions from lender liability;

Lender liability means that a bank can be held liable when it exercises effective control over or, in the exercise of his creditor rights, becomes the owner of the company or property which caused the environmental damage [19]. However, as the Council of Europe Convention implicitly stated, the lender must have had an effective control over the dangerous activity at the time the polluting incident occurred, in order to be considered as an operator and consequently be held liable.

Notwithstanding the validity of connecting the responsible party with the person having this effective control over the polluting activity this surely raises some problems with regard to lender liability. In fact, the principal disadvantages of allowing lender liability is that it would cause difficultiesover the granting of mortgages or other financial guarantees, thereby reducing the possibility of smaller companies obtaining credit and also making environmentally dangerous investments less feasible [20]. In fact, the lack of a lender liability exemption could mean that to minimise liability risks banks may be forced to conduct expensive environmental audits, particularly in the cases where the borrower's land is offered as a security .

In the end, the best solution seems to be that given by the Council of Europe Convention, which implicitly states that when the banks or other financial institutions have lent money to the operator of a polluting activity or company they will not be held liable as long as they do not actively interfere in the management of the financed

[19] With regard to American CERCLA's liability see David Jacoby and Abbie Eremich, "*Environmental Liability in USA*" in Environmental Liability, Chapter V, Part C, who interpreted CERCLA's article 101(20)(A) reference to "owner or operator" as including the person who obtained the facility, title or control of whath was conveyed due to bankruptcy, foreclosure, tax delinquency or abandonment. In other words, according to them the person, who, without participating in the management of a facility, holds an indicia of ownership primarily to protect his security interest in it, shall not be held liable.

[20] In relation to the American experience see Gary Hector, "A new reason you can't get a loan" in Fortune, 1992 confirming that in a type of "green lining" banks are cutting off small- and medium-sized businesses in industries that handle dangerous chemicals or produce contaminated waste

activities [21]. Furthermore, this secured creditor exemption could be complemented by the requirement of lenders to perform according to a previously established due diligence standard, according to which banks and other financial institutions would only be entitled to such exemption if they had complied with certain due diligence obligations [22].

7.2. STANDING

It should be noted that in both the Community law's present position and the provisions established in the Council of Europe Convention, the standing issue is only partially regulated [23]. If, on the one hand, the Draft Directive and the Council Convention specifically give standing to common interest groups and associations, which have as their object the protection of the environment, on the other hand both avoid any reference to the standing of public authorities and of private individuals in general.

7.2.0.1. Environmental Organisations

In fact, these legal instruments not only leave it to the national law to establish the conditions under which the groups or associations referred to may bring an action but

[21] In relation to Canadian law, see Geoffrey Thompson, "*Environmental liability in Canada: the risks for lenders, receivers and trustees*" in Environmental Liability, Chapter IV, Part A who provides for such an exemption by considering that a lender will not be held liable for clean-up costs as long as he does not stray from the purely financial aspects of its relationship with its borrower;
[22] See Thomas McMahon, "*The evolution of US due diligence*" in International Corporate Law, October 1994, nº 39, pp. 10, referring to the Superfunds Reauthorisation Bill and to the American Society for Testing and Materials (ASTM) Provisional Practice for Establishing Secured Creditor Exemption under CERCLA;
[23] For a brief comparative observation about the issue of standing in some EEC Member States see Gerrit Betlem, "*Standing for Ecosystems - Going Dutch*" in Access to Environmental Justice in Europe, Conference of 18/4/94 at the European University Institute;

the standing of public authorities and of individual private parties is also left for the internal legislator. If a specific Member State internal law still bases itself on traditional tort law to compensate for environmental damage, then the European citizen has to face all the traditional procedural difficulties that a more complete harmonisation could have helped him to surmount [24].

Therefore, any future instrument on civil liability for environmental damage should specifically establish that any group or organisation should be able to bring a legal action for environmental damage, as long as their social objectives include the protection of the environment or any other interests for which they sue [25]. Nevertheless, it would be preferable if the environmental associations' right to sue were to be based on reasons of efficient legal protection of its own interests rather than on the protection of joined individual interests [26].

7.2.0.2. Private Individuals

Besides the reference to environmental organisations, such an instrument should also regulate the possibility of claims by private individuals [27], useful in those

[24] For example, in relation to the situation in the UK see Andrew Geddes, "*Locus Standi and EEC environmental measures*" in Journal of Environmental Law, vol. 4, nº 1, 1992, pp. 35 stating that traditionally an UK citizen has standing as long as he has "sufficient interest" in the matter to which the application relates. Geddes also considers that environmental statutes are adopted for the benefit of all citizens and each one of them has an interest in seeing these statutes enforced.

[25] For an exemplary development of national case law see Hans Jessurun d'Oliveira, "*The Sandoz Blaze: the damage and the public and private liabilities*", in International Responsibility for Environmental Harm, Chapter 18, who relates Dutch case law, according to which "environmental organisations have standing and may defend the interests for which they have been established as their own interests";

[26] Contrarily see Gerrit Betlem, "*Standing for Ecosystems - Going Dutch*" in the Conference "Access to Environmental Justice in Europe held on the 18/4/94 at the European University Institute, who cites the Kuunders Case where the environmental organisations right to sue is justified solely on the ground of joining/combining of the diffuse ecological interests of citizens;

[27] In relation to international law see Christian Tomuschat, "*International Liability for injurious consequences arising out of acts not prohibited by international law: the work of the International Law Commission*" in International Responsibility for Environmental

countries where the collective movement is weaker [28]. Furthermore, it should also regulate mass claims by harmonising the existing mechanisms for centralising jurisdiction over the claims. Among these mechanisms, the consolidation of claims in class actions or the consolidation of cases to facilitate the pre-trial process and settlements are some of the procedural means, increasingly used throughout Europe, that could exploited by the liability instruments referred to [29].

In fact, class actions allow members of a certain group of injured persons to bring an action on behalf of the whole class for the compensation of the widely distributed damage [30]. Another possibility for providing incentive for injured persons to bring compensation actions into court could be shifting the legal fees in such cases of public interest litigation

7.2.1. Remedies

With regard to the remedies that should be made available to every potential plaintiff, those suggested by the EC and by the Council of Europe seem to be

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Harm, Chapter 3, who concludes that many minor transboundary environmental damages could be dealt with legal actions brought by private individuals, without any involvement of the governments concerned;

[28] See James Cameron, "*Environmental Public Interest Litigation*" in EC Environment and Planning Law, Chapter 18 who considers that litigation initiated by individuals or groups of individuals through an efficient use of judicial resources, either by establishing a new corporate entity or via class actions, can be an effective mechanism with which to resolve complex complaints and to protect the environment;

[29] See for a more detailed exposure on mass claims, Kenneth S. Abraham and Glen O. Robinson, "*Aggregative valuation of mass tort claims*" in Law and Contemporary Problems, 1990, volume 53, issue 4, pp. 139;

[30] For a more detailed study see Jessurun d'Oliveira, "*Class Actions in relation to Cross-Border Pollution*" in EUI Working Paper, citing Rule 23 of the American Federal Rules of Civil Procedure that defines class actions as the aggregation of a number of persons into a group which is allowed to litigate for the protection of diffuse rights and interest, such as environmental rights;

sufficient. In general terms, the potential plaintiff should be able to take legal action either to obtain an injunction, that is the cessation of the polluting activity, and/or the reimbursement of expenditure taken to prevent, compensate and/or restore the environment [31]. Nevertheless, it remains questionable whether any future legal instrument on the subject should give its Contracting Parties the right to restrict the remedies made available or to determine which plaintiffs may bring a legal action to obtain such remedies, as the draft Directive and the Convention do.

7.2.1.1. Compensation for Damage Stricto Sensu

This last question should be answered remenbering that any future legal instrument which is produced by the present harmonisation effort, should not be so vague as to be considered void of any real utility in the protection of the environment. In fact, it should not be left to the States' internal law to decide whether private individuals can sue to put an end to the polluting activity that is causing damage to their health and/or to their property and/or if they can seek the reimbursement of expenses incurred to prevent such damage.

Private individuals should be able to demand an injunction to prohibit the polluting activity and to seek the reimbursement of expenses made to compensate for property damage [32]. Although the importance of private individual action [33] is not to be deined, if the present state of civil liability law throughout Europe is considered, it seems questionable whether private parties should also have the right to sue for personal

[31] See article 4º of the Original Proposal for a Directive on Civil Liability caused by Waste;
[32] For the following references to the American Oil Pollution Act, see Robert Force, "*Insurance and Liability Pollution in the US*" in Transnational Environmental Liability and Insurance, International Bar Association Series, 1993;
[33] See Chapter 4;

damages . Private parties should also be allowed to request that the responsible party take the necessary preventive or reinstating measures.

7.2.1.2. Compensation for Impairment to the Environment

It is also clear that both the competent public authorities and the recognised environmental associations should be able to obtain an injunction prohibiting the activity which is causing the impairment to the environment. Likewise, but contrary to the Council of Europe Convention [34], these parties should also be able to seek the reimbursement of expenditures made to prevent such impairment and/or to compensate or restore the environment. Furthermore, both these parties should also be allowed to request a court order under which the potential polluter is obliged to undertake the measures necessary to restore and/or reinstate the environment themselves [35].

Although it may seem too radical to allow a private party to bring a legal action based on impairment to the environment which caused no personal damage to himself, it should be taken into account that the environment belongs to all of us and that any "owner" of the environment should always be able to claim reinstatement and/or compensation for the impaired environment [36].

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[34] See article 18º of the Council of Europe Convention explicitly excluding all claims for reimbursement of costs from the actions available to public interest groups;
[35] See the American Oil Pollution Act (OPA 1990) under which a government entity may recover damages for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing the damage;
[36] Likewise, the American OPA establishes that any person who uses natural resources which have been injured, destroyed or lost may recover damages for loss of subsistence use of natural resources, without regard to the owner ship or management of the resources; against see also Emmanuel du Pontavice and Patricia Cordier, "*Compensation for indirect or remote pollution damage in individual countries and at international level*", in Compensation for Pollution Damage, OECD, 1981, Chapter 1, who agree with Despax in considering that the harm done to private individuals is usually the common fate of the whole community, a fact that is sometimes regarded as evidence of the absence of any direct and personal damage which should warrant effective legal proceedings;

7.2.1.3. Limitations of Liability

Strangely enough it seems that only the EEC Commission recognised the need to limit liability not only through the cost benefit analysis proposed in the Draft Directive but also by advocating the establishment of certain financial ceilings in the Green Paper [37]. On the one hand, it may be defensible to constrain the plaintiff to accept cheaper reinstating measures, even if suggested by the defendant, when the cost of his own actions exceeds the consequent benefits to the environment and as long as those cheaper measures adequately reinstate the environment or reimburse the expenditure incurred to this end. On the other hand, the disproportion between the reinstating costs and the consequent benefit to the environment should not be a reason for dismissing those restoration measures but instead serve as an impetus to avoid future pollution.

Although financial ceilings would facilitate environmental insurance, it is doubtful whether a limited liability system would still be useful in the prevention of future environmental damage. In fact, not only would the potential polluters take fewer preventive measures but also the damages above a certain established limit would be supported by the public in general and not by the polluter, thereby distorting the polluter pays principle.

Nevertheless, the suggestion in the Green Paper that when the polluter is not at fault, but an unforesseable damage still occurs, damages should only be awarded up to a certain previously established limit should be considered. However, the Green Paper seems to further suggest that if the polluter is insured and/or could have taken specific preventive measures, those financial limits should not apply, which suggestion would not facilitate environmental insurance.

[37] For a more detailed description of the different possibilities see Chapter 5;

7.2.1.4. Compensation for Economic or other Non-material Damage

This is another aspect whose legal treatment differs from one country to another, namely the problem of whether the loss of profit or other non-material damage should be recoverable via a civil liability action [38]. Such a problem is closely related to the question of whether damage which is not a direct consequence of the polluting incident may be subject to compensation. According to recent developments, the financial loss due to an environmental damage which is not an immediate physical consequence of the polluting incident but from the legal standpoint is considered to be a direct, although remote, cause, is subject to compensation via a civil liability action [39].

In fact, following the more recent court rulings on the subject it seems that the trend is towards accepting claims for loss of profit that may arise from situations of damage *stricto sensu* [40]. However, it is rather peculiar that courts and legislators are reluctant to recognise the right to claim compensation for loss of profit or other non-material damage arising from the impairment to the environment. In fact, the damage

[38] For another distinction see Robert E. Godin, "*Theories of compensation*", in Liability and responsibility: essays in law and morals, who defines pecuniary harms as the damages to one's property or earning capacity or the creation of legal liabilities and non-pecuniary harms as including bodily harm, emotional distress, humiliation, fear and anxiety, loss of companionship, loss of freedom, distress caused by mistreatment of a third person or a corpse;

[39] See Emmanuel du Pontavice and Patricia Cordier, *supra* note , who also consider that only indirect damage, in the sense of its being traceable to the original event through an unforeseen sequence of exceptional circumstances, should not subject to compensation;

[40] Also under the American OPA economic losses resulting from the destruction of real or personal property shall be recoverable by a claimant who owns or leases that property; see also Colin de la Rue, "*Environmental Damage Assessment*" in Transnational Liability and Insurance, Part C, Chapter 1, who concludes that pure economic loss, without any accompanying damage to property is in general irrecoverable in English Law;

to the environment in itself is as likely to cause damage for loss of profit or other economic loss as the damage to personal property [41].

7.2.1.5. Punitive Damages

Under certain regimes, the plaintiff can be attributed punitive damages which exceed the total amount of economic loss incurred but normally only when the defendant's conduct has been faulty or negligent. In other words, if the potential polluter acted without the required diligence he should be penalised for such lack of care.

Contrarily, it is believed that environmental liability should be more of a preventive than of a repressive nature and therefore punitive damages should not be included among the remedies available to the plaintiff under any future legal instrument. Nevertheless, it may prove interesting to study the possibility of the defendant being ordered to pay damages to a citizens group oriented to the investigation and prosecution of industry violators of environmental law [42].

7.2.2. Burden of Proof

7.2.2.1. Causal Link

In theory, it is the injured party who must adduce the evidence of the causal relationship between the damaging activity and the resulting damage, but in reality it

[41] In fact, under the American OPA any person may recover damages equal to the loss of profits or impairment of earning capacity due to injury, destruction or loss of real property, personal property and/or natural resources.
[42] See David Jacoby and Abbie Eremich, who consider that these damages can be considered punitive if it is not but a substantial portion of the normal damage award; see also Hans Jessurun d'Oliveira, who concludes that by giving total freedom in the allocation of the damage awards, a civil liability regime may lead to compensation but not necessarily to the restoration of the environment;

may prove difficult to establish such a link with total certainty, for example in those situations where only the accumulation of polluting emissions from several sources leads to harmful effects [43]. In fact, the requirement of this causal link between the polluting incident and the damages suffered is still one of the major obstacles to an efficient compensation for environmental damage through any civil liability system [44].

Nevertheless, the recent trend has been the evolution from scientific proof of causation to a reversal of the onus of proof of causation, by adopting a much broader concept of general capability to cause environmental damage [45]. Therefore, on the one hand, any future instrument on civil liability for environmental damage should acknowledge the increasing use of epidemiological studies, general statistics and probabilistic proof [46] to ascertain the referred causal link. On the other hand, it would perhaps be convenient to examine the feasibility of establishing the reversal of the burden of proof. In fact, under certain conditions it should be the potential polluter who has to prove that the specific damages have not been caused by any polluting incident originated by the activities under his control [47], which are generally capable of causing environmental damage.

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[43] Furthermore, see Glen O' Robinson according to whom the complexity of assigning causal responsibility is proportional to the elapsed time between the exposure to an environmental risk and its causal determination;

[44] See Hans-Dieter Sellshopp, "*Multiple tortfeasors/ combined polluter theory, causality and assumption of proof/ statistical proof, technical insurance aspects*" in Transnational environmental liability and insurance by Ralph Kröner, 1993 recalling that the problem of the negligence criteria in fault liability was substituted by the causation standard in strict liability;

[45] See Hans-Dieter Sellschopp;

[46] See Glen O'Robinson, "*Risk, causation and harm*", in Liability and responsibility: essays in moral and law, according to which probabilistic evaluations will be based on aggregate statistics that will not differentiate between manifested harms that probably were the product of a particular risk exposure and anticipated harms that will probably ensue from it;

[47] For example, see the German Environmental Liability Law of 1990, which establishes a presumption of causation according to which if a certain installation is capable of causing environmental damage it is presumed that it did so;

7.2.2.2. Joint and Several Liability

As has been previously analysed, the problems of proving causation are sometimes overcome by the acceptance of a joint and several liability rule, according to which one of the individual persons responsible for part of the damage can be held liable for the whole amount of it [48]. In fact, such a rule would facilitate the plaintiff's burden of proving the causal link between all the polluting incidents and their consequent damage.

However, one of inconveniences pointed out with regard to the acceptance of this rule of joint and several liability, is that the subsequent contribution actions brought by the defendant, previously held responsible for the whole damage, against the other liable parties would congest the courts and further raise the transaction costs. This may be solved by previously establishing the person to whom liability would be channelled [49] and by prohibiting the defendant to seek redress. Nevertheless, this option seems too drastic in relation to the significance of the problem [50].

However, maybe a mixture between the system proposed by the Convention and that proposed by the draft Directive would efficiently deal with such problem. In other words, if a rule of joint and several liability is accepted it may be convenient to both channel liability into a previously established order and to enable the defendant to prove that only part of the damage was caused by his individual activity. In the end, liability would be more efficiently channelled but the defendant held primarily liable would be able to prove that the damage being divisible, the polluting activity under his control has only partially caused the environmental damage in question.

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[48] See Chapter 5, paragraph 5.5 and Chapter 6, paragraph 6.2.7.1;
[49] According to point 2.1.4
[50] See point 2.1.4. of the Green Paper according to which imposing liability on a specific party may be an efficient and equitable way of cost internalising. Furthermore, it will also promote prevention if this specific party has the operational control to carry out the most effective risk management either because it has the biggest resources and/or expertise;

7.2.3. Defences

According to the defendants of the stronger version of civil liability for environmental damage, any instrument on the subject should be inclined to limit the possible grounds for exemption from liability, in order to assure a more effective protection of the environment through adequate compensation for pollution victims. However, such an unlimited liability system, with no exemptions and no financial ceilings, would only be accepted with great difficulty.

7.2.3.1. Force Majeure

This was one of the aspects on which the international and community legislator were not able to agree, as has been seen in the preceding Chapters [51]. Despite the criticisms made of the classic definition of International Law, namely that it exhaustively lists the specific situations of *force majeure*, this definition still seems preferable. However, this definition of *force majeure* that excludes any person from liability if he proves that the damage was caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character still allows for a certain margin of discretion in its interpretation.

The definitions advocated by the EEC institutions not only seem too vague but are also dependent on the interpretation made of several abstract concepts they refer to, such as the term "acts of God" [52] and the concept of "unusual and unforeseeable

[51] See Chapter 6, paragraph 6.2.8.1 and Chapter 5, paragraph 5.7.1;
[52] See point 13 of the Explanatory Statement, according to which the polluter can only be exempted from liability if he proves not only that the damage was caused by acts of God but also that his actions were not negligent in relation to such a risk;

circumstances" [53]. Nevertheless, it seems that the trend is towards considering the increasing technical means to control these natural events and therefore to abolish the defence based on a "Act of God".

7.2.3.2. Fault or Interest of the Injured Party

This is one of the less controversial grounds of exemption, according to which when the victims conduct or omission has contributed to the damage, the liability of the responsible person should be reduced accordingly or disallowed. In other words, if the defendant is able to prove that the behaviour of the injured person, or any other person under his responsibility, has partially or wholly contributed to the damage or injury to the environment, his liability should be accordingly waived.

It is still unclear whether the defendant has also to prove that the contributory acts of the injured party, or any other person under his responsibility, were faulty or negligent. As already mentioned, if there is no such need to prove the faulty or negligent behaviour of the victim, the latter would be subject to a kind of strict liability system according to which the defendant would only have to prove the causal link between the contributory acts of the referred victim and the damage in question.

Notwithstanding the "strictness" of this system it seems preferable to avoid linking this exemption with the requirement of proving the fault or negligence of the victim, which elements can be to difficult to fulfil but without which the exemption can still be claimed. Instead, the existence or non-existence of fault can be translated into the degree to which the liability of the defendant is reduced or disallowed.

7.2.3.3. Contributory Acts of Third Parties

[53] See the definition of *force majeure* given by the ECJ on the Case 145/85, *Denkavit België v. The Belgian State*, ECR 1987-2 ;

Concerning the intervention of third parties it seems peaceful that the liability of the defendant shall be waived if he proves that the damage in question was caused by the intentional conduct of a third party. However, unlike the above exemption, the defendant will have to prove that not only was it the faulty conduct of a third party that caused the damage but also that he himself was not at fault, having taken all the adequate measures to prevent and avoid such damage.

7.2.3.4. Authorisation by Public Authorities

Concerning the possibility of avoiding liability by complying with the conditions set in the permit issued by the competent public authorities, the legal instruments analysed have differed in the rights given to the defendant. On the one hand, the EEC draft Directive establishes that the existence of such a permit does not limit or exclude civil liability for damage and injury to the environment. On the other hand, the Convention excludes the defendant from liability if he proves that he was complying with a "specific order or a compulsory measure of a public nature" legal rules.

As has already been mentioned, one of the purposes of any environmental permit is to allow national governments to control the polluting activities below an acceptable level that can be difficult to establish. However, since these levels are also subject to constant change, even when the polluting activity has been previously authorised damage to the environment may still occur [54]. Therefore, the mere holding of official authorisations should not discharge the person responsible for the environmental damage from his environmental liability. Nevertheless, it is up to the plaintiff to

[54] This paragraph will repeat some of the thoughts expressed in Chapter 5, because of their importance in concluding for the best solution to the question;

demonstrate that his conduct lies within the ambit of the authorisation which covers his activity under legal or administrative regulations.

Taking into account that certain public authorities are given the competence - and also the duty - to establish the acceptable quantity and quality of the polluting activities, they should be considered as regulatory bodies responsible for a specific environment. Therefore, it has been increasingly maintained that the public authority which has issued a "pollution permit" should be held liable for the damage caused by the authorised activity, where the latter has fully complied with the standards set in the permit. However, this public authority is not to be held liable for the pollution itself but for the inadequate formulation of the applicable legislation or permits or for the deficient control of the installations causing pollution.

Finally, as has already been suggested the liability of these public authorities should be proportional to their effective responsibility in the environmental damage in question and therefore it should be joint and several with the "real" polluters [55]. This rule of joint and several liability is based on the idea that even if the defendant's polluting activities have been duly authorised, the latter are expected to exercise their activities in good faith without abusing their pollution permits [56].

7.2.3.5. Contractual Derogation

Unlike the EC Draft Directive, the Council of Europe Convention does not explicitly refer to the question of whether it is possible to negotiate the liability that arises under its provisions. Nevertheless, it appears logical that any "environmental"

[55] See Chapter 5;
[56] Within the field of international law see Thomas Gehring and Markus Jachtenfuchs, "*Liability for Transboundary Environmental Damage*" in European Journal of International Law, vol. 4, nº 1, 1993, pp. 105, who conclude that damage from activites not prohibited by international law should be subject mainly to a primary liability of the private parties and only sometimes to a subsidiary liability of licensing states;

liability system should not allow liability to be negotiable, in order to avoid dangerous activities being passed on to smaller companies with an insufficient financial capacity to cover any potential environmental damage.

However, the validity of certain contractual arrangements between the person that is held liable and the person actually responsible for specific environmental damage should be left to internal law.

7.2.3.6. Acceptable Level of Pollution

According to recent doctrine an acceptable level of pollution should not be included among the possible grounds for exemption, since its interpretation would probably lead to several discrepancies.

7.2.4. Limitation Periods

7.2.4.1. Expiration Period

In relation to the time limits within which a pollution victim may bring a legal action for damage or impairment to the environment, both the draft Directive and the Council of Europe Convention seem to agree that harmonised expiry periods are necessary to avoid situations of forum-shopping, where the potential plaintiff would choose the jurisdiction with the longest expiration period.

Accordingly, the legal proceedings for the recovery of damages shall be barred after an expiry period of three years from the moment the plaintiff knew or should have known of the damage and of the identity of the polluter. This last reference to the identity of the polluter should also be included because in many pollution cases it may take several years for the plaintiff to investigate and determine who is the individual defendant among the potential polluting parties. It is advisable to establish

such an expiry period to allow for better administration of justice and to avoid any abuses.

Furthermore, following the options made in most civil liability systems a general expiry period should also be established, according to which no actions may be brought after a period of thirty years from the moment the polluting incident occurred. However, any future instrument on civil liability for environmental damage should specifically determine thge date from which this general expiry period is to be counted, namely by clarifying the interpretation that can be made of the term incident [57].

7.2.4.2. Retroactive Application

Within Europe, all sides of the discussion table seem to agree that any system on civil liability for environmental damage should not be retroactive, since it is settled that a specific activity performed before the entry into force of a certain liability instrument should not be unduly penalised with the restoration of damages from the past. In other words, any future environmental liability instrument should clearly specify from what date it shall apply without relating it to past damage [58].

The specific characteristics of the prospective application of any future instrument will depend on the activities within its scope. For example, the Council of Europe Convention establishes specific regimes with regard to the situations of continuous polluting occurrences and/or series of occurrences and another different application regime for the permanent waste deposit sites. The first situations applies only to those

[57] See article 17º/2 of the Convention and point 78 of the Explanatory Report, according to which this general expiry period shall be counted from the end of a continuous polluting occurrence or from the last of a series of occurrences having the same origin. In relation to the permanent deposit of wastes the period shall be counted from the date when the site was legally closed;
[58] See point 7 of the Explanatory Statement of the "Report on Preventing and Remedying Environmental Damage" (hereafter Explanatory Statement);

damages caused by occurrences which took place after the Convention provisions were in force, but the regime in relation to the waste disposal sites applies only to those damages which become known after the same entry into force. Despite this difference, neither regime considers relevant the moment when the polluting incident occurred. Regardless of the concrete option chosen by any future instrument, it will thusalways be necessary to clarify and determine the term "incident".

7.2.5. Insurance

As previously concluded, the main concern is that if insurance is to be made compulsory it should be available on the market at a reasonable price and under exactly the same conditions that it is required. At the present moment, the situation is critical since most insurers only cover accidental events when the applicable environmental standards have been complied with [59]. In fact, the insurance market encounters several difficulties in providing insurance coverage for environmental damage, namely the definition thereof, the probability of its happening and its probable extent.

Nevertheless, it is also clear that the availability of adequate insurance leads to lower production costs and allows polluting companies to direct their resources, based on an accurate assessment of their environmental costs in the form of premiums, to their most efficient use [60].

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[59] See Jean Bigot, "*Compensation for pollution damage and insurance*", in Compensation for Pollution Damage, Chapter 4, who still includes among the main criteria of insurability the fortuitous character of the polluting incident, the compliance by the insured with all environmental standards and the suddenness of the cause of damage;

[60] See George C. Freeman Jr. and Kyle E. McSlarrow, "*The proposed EC Directive on Civil Liability for Waste - a comparison with the US Superfund liability regime*", in EC Environment and Planning Law, Chapter 13;

7.2.5.1. Harmonisation of European Insurance Law

Therefore, if any future instrument on civil liability for environmental damage requires mandatory insurance, perhaps a previous harmonisation of European insurance law would be useful. In fact, not only may the differences in premiums and insurance conditions create market distortions, but also by leaving everything to be determined by the insurers themselves it may transform them from environmental policeman to industrial licensers, thereby stifling the industry [61].

Furthermore, harmonisationrecent tendencies in the European insurance market must take into account, for example, the constitution of new types of non-exclusive pools and the extension of coverage to gradual pollution risks [62].

7.2.5.2. Insurance Coverage

In general terms, environmental insurance coverage should be extended, for example it should also cover the salvage expenses and some types of non-accidental damage, such as gradual and synergetic pollution [63]. Nevertheless, any regulation on

[61] See the Green Paper, according to which compulsory insurance may lead to a situation where insurers decide whether to provide or withhold insurance coverage to a specific company if the latter has a good or bad environmental risk;
[62] See Ralph P. Kröner, "*Environmental Liability Insurance: Tour d'horizon in Europe*" in Transnational Environmental Liability and Insurance, Part A, Chapter 1, which justifies these new forms of pooling to underwrite new, relatively unknown pollution risks under a well-controlled regime of environmental legislation and exemplifies this coverage extension with two Swedish insurance companies who have deleted the traditional exclusion clause for gradual pollution from their new general liability insurance policies for middle and small-sized industries;
[63] See Jean Bigot, "*Compensation for pollution damage and insurance*" in Compensation for Pollution Damage, Chapter 4, who in relation to salvage expenses considers that by minimising the consequences of an accident , the insured party is taking care of the interests of the insurer and, in accordance with the general principles of law, should be compensated for doing so;

environmental insurance should always provide for certain limitations, for example by excluding from its coverage the cost of liability for damage caused intentionally [64].

Furthermore, insurance can only become an efficient means of addressing the risk of pollution liability if said risk is assessed accurately, namely through adequate environmental audits, and if sufficient claims reserves are correspondingly set [65]. Accordingly, the conditions, exclusions and limits of any insurance policy will have to be specifically established, taking into account the particular characteristics of the environmental risks to be covered.

7.2.5.3. Geographical Coverage

It may prove convenient to restrict coverage to a site that has previously been specified in the insurance policy, thereby allowing the insurer to elaborate sound ratings based on the real nature of the environment in which the insured carries out his activities [66].

7.2.5.4. Temporal Coverage

In order to guarantee adequate compensation of environmental damage, insurance coverage should pay all claims for damages caused by polluting incidents occurring during the policy period, even if the policy has terminated [67]. In fact, if

[64] See Werner Pfennigstorf, "*The continental view*", in Transnational Environmental Liability and Insurance, Part D, Chapter 2, who also considers that insurance should be limited through reinsurance, aggregate limit per policy period, limits per event and/or by providing for serial claims clauses;
[65] See Charles S. Donovan and Elisabeth M. Miller, "*The American View*", in Transnational Liability and Insurance, Part D, Chapter 1, who also refers to other limitative causes to the insurability of the risk of environmental pollution liability, namely the lack of claims history, the uncertainty of coverage under existing policies , the likelihood of resulting litigation and the sheer magnitude of the potential liability;
[66] See Ralph P. Kröner;
[67] In fact, the traditional general liability policies exposed the insured to a run-off risk by covering the liability of the insured provided it is based upon an act or omission committed during the period of the insurance;

coverage was only given to claims made during the policy period or within a certain deadline, these pollution delayed effects or pollution caused by person who has since become insolvent, would probably be left unpaid [68].

7.2.5.5. Future Perspectives

However, in those situations of damage where it is not possible to identify the individual polluter but only the branch of industry which has probably caused the polluting incident, it may be preferable to compensate for such damage through a previously established fund, due to the insurance high costs. However, since the adhesion to such funds should be voluntary [69], the companies which are not members of any fund should be obliged to acquire insurance for their potential polluting activities.

Besides these systems of compulsory insurance and compensation funds it would perhaps be interesting to study other possibilities such as insurance contracts, self-insurance, mutual funds and insurance pools [70].

7.2.5.6. Insurance Pools

Insurance Pools is one of the possibilities referred to above, which should be specifically analysed since it is gaining increasing support among the European States. In fact, the main insurance pools, the Dutch Mas, the French Assurpol, the

[68] See Ralph P. Kröner, who notes the tendency towards the adoption of a "claims made" system, whose policies apply a scheme based upon a limit per claim and per insurance year;
[69] To avoid situations where the admission to a specific fund results in the introduction of a closed shop or restricts the access to a profession or market;
[70] See Anthony J. E. Fitzsimmons, "*Non-marine environmental liability: the use of insurance pools and the European dimension*", in Transnational Environmental Liability and Insurance, Part D, Chapter 3, who defines insurance pools as contractual arrangements under which insurers band together to share common administrative facilities, the risks underwritten being split between the pool members in fixed proportions, overheads usually being split in the same proportions;

Swedish and the recent Danish Pool have helped to obviate several problems that compensation for environmental damage was encountering in those countries.

The main characteristics of these European pools is that unlike normal insurance policies, they usually cover gradual pollution and financial losses, the latter under certain conditions. However, they do not generally cover ecological damage, damage notified after expiry of the insurance, illegal pollution and polluting acts or omissions prior to the start of the policy and also after its expiry. The use of questionnaires, local inspections and further technical investigations are among the working procedures required for acceptance to the pools, but at this phase some pools cover the expenses incurred to prevent spreading of pollution and expenses for verifying whether pollution has occurred [71].

Some of these characteristics of the European pools should be taken into account in the formulation of any future joint compensation scheme.

7.2.6. Joint Compensation Schemes

In fact, there are several situations where it is not feasible to compensate environmental damage via civil liability law, particularly when it is not possible to identify the responsible party or when the polluter has since become insolvent. In such situations compensation should be paid by such funds, especially when there is no other course of redress, either because the environmental damage cannot be

[71] For a very interesting and complete comparison of the different European pools, I had the opportunity of hearing Jens O. Nielsen, Risk Management Engineer at TOPDENMARK and Consultant to the Danish Pool of Environmental Impairment Liability

attributed to a particular polluter or its compensation cannot be obtained from insurance [72].

Furthermore, in the situations of chronic pollution, of discharges licensed by the competent public authorities, or of "historical" damage it is also necessary to use other collective forms of compensating the damage caused. However, certain EEC instances feel that these cases of chronic, cumulative and past pollution are better dealt with at national and regional level, since their institutional representatives are more aware of their initial evolution [73].

The main advantages of any compensation scheme are that the compensation costs would be jointly and more easily shared and usually the damage is indemnified more quickly [74]. On the other hand, two factors must be clearly established: which economic sectors should contribute to a specific fund and the conditions of these contributions , which should be assessed according to the risk of damage [75]. This last aspect is of great importance in the maintenance of the deterrent effect that encourages the polluter companies to manage their environmental risks: one

[72] See Volker Thiem, "*Environmental Damage Funds*" in Compensation for Pollution Damage, Chapter 5, who compares the different national compensation funds and formulates the basic traces of an exemplary fund model; in relation to the *American experience* the recent speech of Jess Manuel Alonso, CPCU of Noel/Greaves Incorporated at the *Conference on Insurance for Environmental Damage* held in Lisbon at 25/11/94 explaining the new types of coverage's that have been recently introduced, namely Environmental Remediation Insurance, Integrated Environmental Protection Insurance and combined Professional/Contracting Environmental Liability Insurance;

[73] See point 8 of the Explanatory Statement;

[74] See paragraph 5.4.9 of Chapter 5; see also point 3 of the Green Paper stating that under joint compensation systems the cost of damage, which is the result of the aggregate impact of a sector's activities, is internalised by becoming apportioned among the individual companies.

[75] See Ida Koppen, remembering that under International Liability Law several private compensation schemes have been established, such as TOVALOP, CRISTAL, OPOL, whose contribution formula obeys to the principle of allocating costs and risks among a plurality of actors who are not polluters *stricto-sensu*;

possibility could be that of grading the contributions according to the potential risks involved in the variouis companies' activities [76].

The specific characteristics of a European Compensation Fund will depend on the scope of the liability instrument to which it relates, namely on the type of activities covered and on the limitations imposed on this liability.

7.2.6.1. Green Taxes

According to the EC's policy of fiscal harmonisation it could be determined that certain taxes or levies on polluting products, on polluitng instalations and/or on pollution in general would be predestined to a European Compensation Fund which would contribute to the restoration of the environment when the civil liability system fails to do so [77]. In fact, such an environmental policy follows the recent trend of european and international solidary in the field of protection of the environment [78]. For example, in the fight against CO2, the European Commission has proposed levying, at European level, an environmental tax as an incentive to combat carbon dioxide emissions at all levels

[76] In relation to collective liability regimes see Guntner Teubner, "*The invisible cupola: from causal to collective attribution in ecological liability*" in Ecological Responsibility: Self-organisation in Environmental Law, who prefers the combination of the distributional advantages of collective liability with the incentives of an individualising apportionment;

[77] Following the trend affirmed in the 5th Environmental Program, according to which the fiscal measures should "progressively serve to discourage pollution at the source or encourage the use of appropriate production processes"; see also Edgar Gold, "*Marine Pollution Liability after Exxon Valdez: the US all-or-nothing lottery!*", in Journal of Maritime Law and Commerce, vol. 22, nº 3, July-October 1991, pp. 423, who describes the international liability and compensation regime for oil pollution damage and states that the International Oil Compensation Fund is financed by a Contracting State levy oil imports by oil companies;

[78] See the speech by Mrs Scrivener, "*International Solidarity: The contribution from Environmental Taxes and Taxation on Savings*" on Tax Letter Europe of November 7, 1994, pp. 7;

The American "Superfund" experience indicates that such a scheme is efficient for emergency cases but the retrospective provision of CERCLA has raised several doubts as to general fairness and efficiency of this system. The best choice seems to be to leave it to the States internal laws to regulate the situations of damage inherited from the past, which situations were subject to national law at the time the damage was caused.

7.2.7. Conclusion

The dualistic solution suggested by the Green Paper seems to be a very attractive one: when a certain environmental damage can be attributed to an individual polluter who is solvent, the injured person should seek compensation via a civil liability action brought in the competent court. Although such a solution is peaceful among the different sides of the legal and theoretical debate, the specific characteristics of the applicable civil liability system still lead to certain elements of discord. Within the EC, the latest position has been to establish a system of strict liability with several exclusion clauses. However,recent suggestions have been to introduce a much stricter system of absolute liability and also a reversal of the burden of proof with respect to causation [79].

On the other hand, when damage can not be paid for via civil liability, for the reasons mentioned above, it should be compensated through a compensation scheme. Among possible compensation schemes an interesting development is the establishment of voluntary annual agreements between economic groups and the

[79] See point 10 of the Explanatory Statement;

State, which agreements should specify the amount of each contribution and the measures that should be taken to remedy any damage [80].

[80] Furthermore, as in Japan, other types of non legally enforceable instruments could be used, such as pollution control agreements, which are private contracts signed between a private enterprise and the local authority or the local citizen groups specifying the "pollution rights" and preventive duties of the private company. See Kazu Kato, "*The new frontiers of environmental policy in Japan*", Chapter V, Part B of Environmental Liability;

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